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NORTH CAROLINA REPORTS
VOL. 35

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1851, TO AUGUST TERM, 1852,
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VOL. XIII.

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HISTORY OF THE SUPREME COURT REPORTS OF NORTH CAROLINA AND OF THE ANNOTATED REPRINTS

BY THE ANNOTATOR

The annotated reprint of our Reports has been made under the authority conferred on the Secretary of State by Laws 1885, ch. 309, and subsequent statutes, now C. S., 7671.

It may be of interest to the profession and to the public to give some data as to our original Reports and the Annotated Edition. All the volumes from 1 to 164, inclusive, have been reprinted with annotations.

The first 7 volumes of N. C. Reports were not official, but, as in England till 1865, reporting was a private enterprise. When the N. C. Supreme Court as a separate tribunal was created in November, 1818, to take effect from 1 January, 1819, the Court was authorized to appoint a Reporter with a salary of $500 on condition that he should furnish free to the State 80 copies of the Reports and one to each of the 62 counties then in the State, and it seems that he was entitled to the copyright. Later this was changed to 101 copies for the State and counties and a salary of $300 and the copyright. In 1852 the salary was raised to $600 and the number of free copies to the State and counties and for exchange with the other States was increased, 103 N. C., 487.

The price charged by the Reporter to lawyers and others was 1 cent a page, so that the 63 N. C. was sold at $7 per volume, the 64 N. C. at $9.50, and the 65 N. C. at $8. Being sold by the page, it was more profitable and much less labor to the Reporter to print the record and the briefs of counsel very fully without compression in the statement of facts. These prices being prohibitive, the Official Reporter was abolished, Laws 1871, ch. 112, and the duties were put on the Attorney-General who was allowed therefor an increase of $1,000 in salary, and the State assumed all the expense of printing and distributing and selling, 5 per cent commission being allowed for selling. Code, 3363, 3728.

In 1893, ch. 379, the system was again changed and the Court was allowed to employ a Reporter for $750. This has been amended by subsequent acts, so that now the Reporter is allowed a salary of $1,500, $500 for room rent, and a clerk at $600 per annum. C. S., 3889.

When the small editions originally printed were exhausted many volumes of the Reports could not be had at all and others brought $20 per volume. To meet this condition, Laws 1885, ch. 309, with the amendments above referred to, being now C. S., 7671, was passed to authorize the Secretary of State to reprint the volumes already out of

print and such others as from time to time should become out of print, with a provision that no money should be used for the purpose except that derived from the sale of the Reports. As the price of the Reports had been reduced to $2 per volume, and later to $1.50, this work of reprinting could be done only by omitting briefs and by cutting out all the unnecessary matter in the statements of facts, as had been done by Judge Curtis of the U. S. Supreme Court when he reprinted the first 58 volumes of that Court in 21 volumes. In our Reports these statements of cases (until a very recent date) were always made by the Reporters, and not by the judges, and the briefs were already omitted in our current volumes.

The Secretary of State at first tried the experiment of reprinting a few volumes without eliminating the unnecessary matter and without annotations, and without correcting the numerous typographical errors; but this proving unsatisfactory to the profession, and the expense entirely too great, after consultation with the Governor and Attorney-General, the then Secretary of State requested the writer to annotate the volumes in order to make them more salable and to reduce the expense of the work (which was necessary) by condensing prolix statements and omitting briefs of counsel. This has been done ever since. The annotations have been made, for the most part, without any aid, as Shepard's Annotations (which, besides, required to be checked for possible errors) were not issued until 1913, after most of these reprints had been annotated. Besides this, in the first four volumes, as issued, there was no index of Reported Cases, and there was no reverse index to the Reported Cases till 84 N. C. There was no table of Cited Cases until 92 N. C., and no reverse index of Cited Cases till 143 N. C. The Annotator had therefore to correct these defects by putting in full indices and reverse indices of Reported Cases and Cited Cases and has supervised the revised proof of all 164 volumes. For these labors, the payment at first was $25 per volume, including annotations, condensing the Reporter's statements of fact when unnecessarily prolix, and all work of every kind. But the later volumes being larger and the annotations more numerous, $50 per volume was allowed. Any lawyer will see that this work was undertaken in the interest of the profession and the State, and not for the compensation.

Owing to the fact that as to these *Reprints* there was no Reporter to be paid, either by profits of sale as formerly, or by salary as now, the reprints have all been issued at a considerable profit to the State. It is probably the only work of any kind from which the State has received any pecuniary profit. In November, 1915, the State lost by fire 47,000 of the Reports then stored in Uzzell's Bindery, with the result that many

additional volumes were required to be reprinted, and others that had already been annotated and reprinted were reprinted a second time, the annotations, however, being brought down to date.

The current Reports were sold till recently at $1.50 from which the commission of 12½ per cent for selling was deducted, *i. e.*, about 19 cents, making the net return to the State $1.31 per volume, while, owing largely to the increase in the cost of typesetting, presswork, paper and binding, the cost to the State of the 174 N. C. is $1.94 per copy, without charging into the cost of production any part of the compensation of the Reporter and his clerk. The price of the current Reports has since been raised.

In all the more recent volumes the statement of the cases has been made by the judges themselves in each case, and hence in reprinting those volumes there has been no abbreviation of the statement of the case. In the earlier volumes there has been a saving often of 50 per cent by condensation of the prolix statement or of the record, which was often used instead of a statement, and by the omission of the briefs. Even in using the original reports, notwithstanding the prolix matters printed therein, it has sometimes been found useful by the Court to refer to the original record.

In England there was no official reporter till 1865. Prior to that time all the reporters were volunteers without any supervision. As a result many of the English Reports are very inaccurate, as has been shown from investigations made in the Year Books and the Court Records by Professor Vinogradoff and others. See Holdworth's "Year Books"; Pollock & Maitland's History of English Law. These reporters were sometimes incompetent and more often careless, which is to be regretted, as the opinions of the English judges were usually, if not always, delivered orally from the bench and the reporters were not always careful to correct themselves by examination of pleadings and records. And as the common law is made up of these decisions of the judges, under the guise, it is true, of "declaring the law," the report of an opinion was not infrequently, in those times, different from what was really announced by the Bench. See Veeder's "English Reports." Besides, down till Blackstone's time, the pleadings and records were kept in dog Latin (and he strongly censured the change to English), and for several hundred years the oral pleadings and the decisions of the judges were in Norman French.

Nowhere outside of the English-speaking countries are the opinions of the Courts allowed to be quoted as precedents. In France and all other countries the Court makes a succinct statement of the facts, numbered under headings, and then merely cites the section of the Code—applicable, without comment. In English-speaking countries, in which alone

the Reports of decisions are allowed to be cited at all, the number of the volumes of the Reports in 1890 were 8,000. These have now increased to 40,000 volumes. This system is breaking down under its own weight. No private library and few public libraries can possibly keep up with the rapidly rising flood of Reports. It is only by the aid of compilations like "Cyc." and its second edition, the "Corpus Juris."; A. & E., and R. C. L., and the like, that we can have any access to the vast quantity of reported decisions.

In those countries where citations of former decisions are not allowed, the argument is that the Courts of the present day are more likely to be right than those in the past, and that to cite former decisions is simply a race of diligence in counting conflicting opinions, a precedent being readily found to sustain any proposition. We have been accustomed to the present system and are still able to wade through by use of the compilations cited; but this relief, in view of the steadily increasing output of Reports, is only temporary, and the profession and the Courts must inevitably be submerged beneath the flood. What the remedy will be is a matter engaging the attention and arousing discussion among the ablest men of the Bench and Bar.

On an average, the opinions of this Court now require three volumes a year. If the briefs and redundant statements were still inserted as in the earlier reports, it would require ten volumes per year, taxing the shelf room and purses of lawyers. It was therefore eminently proper in reprinting to cut out the briefs and reduce the superfluous records. This required the exercise of judgment and much labor, but it was absolutely necessary in order that the receipts might furnish funds for other Reprints as required by the statute. Many of the Reprints are consequently from a third to a half the size of the former volumes. The American Bar Association, voicing the general sentiment, has passed resolutions requesting all Courts to reduce the size of current Reports by the judges shortening their opinions, a request which has been presented to this Court through a distinguished member of the Association and of the Bar of this Court. The General Assembly had already given a similar intimation by providing that "The justices shall not be required to write their opinions in full, except in cases in which they deem it necessary." C. S., 1416.

RALEIGH, N. C., 1 May, 1922.

Walter Clark

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1851

WILLIAM OVERMAN, ADMINISTRATOR, ETC., v. DANIEL COBLE AND HENRY STALY.

1. Where a witness to a contract, subsequently to his attestation, acquires an interest in the contract through or under one of the contracting parties, he is an incompetent witness for the party so creating the interest, unless the circumstances entirely negative any idea of fraud, as where the interest was thrown upon him by the act of the law, or where, after attestation of an instrument the witness has married the party seeking to establish the instrument.

2. Where a plaintiff gives evidence of the declaration of a defendant, the defendant has a right to call for all the defendant said at the time, provided it be pertinent to the issues or to the declarations proved by the plaintiff, but not otherwise.

3. A party claiming a new trial because of evidence improperly rejected must set forth in his bill of exceptions what was the evidence tendered, in order to enable the Court to decide upon its relevancy.

APPEAL from *Ellis, J.*, at the Fall Term, 1851, of RANDOLPH.

TROVER for a bed, and a variety of articles of household furniture, brought by the plaintiff, as administrator of Rachel Bunting, against the defendants, Coble and Staly.

It appeared in evidence that the intestate, Rachel Bunting, who had lived in the house of defendant Coble for fifteen years, died on 27 September, 1846. Defendant Coble, after her death, sold the property in question to defendant Staly, who removed it to his own house. Defendants relied for title on a bill of sale for the property, purporting to have been made by the said Rachel to defendant Coble, and to be witnessed by defendant Staly. This bill of sale was offered in evidence, upon proof of the handwriting of the said Staly. A bond by Coble to Staly was also offered in evidence, purporting to have been made at

the same time with the bill of sale, conditioned for the support of the said Rachel by Coble, during her lifetime. This was in like manner attested and proved.

Plaintiff insisted that these papers were forgeries, after the death of the said Rachel, and offered evidence tending to show that they were not in existence during her lifetime, but were made subsequently. To rebut this evidence, defendants proved that a few days before the death of Rachel, the defendant Staly came home from her house with two papers, which he filed among his deeds. Defendants then pro-
(3) posed to prove that at that time, Staly said that he had been at the house of Coble, and had written a bond for the support of the said Rachel by the said Coble, and a bill of sale from Rachel to Coble for the property in controversy, and that the papers which he then had with him were the bond and bill of sale, the first having been executed by Coble and the latter by Rachel, on that day. This evidence was objected to on the ground that it consisted of the declaration of the defendant only, and the objection was sustained by the court, and the evidence rejected.

A witness testified that after the alleged sale to Staly, in 1847, he purchased from defendant Coble a flaxwheel, as the property of the said Rachel, and the witness went on to say that at the time of the sale the defendant spoke of it as the property of the said Rachel. Upon cross-examination defendant's counsel proposed to give in evidence all the declarations of Coble at that time, which, upon objection, the court refused to permit.

A verdict was returned for the plaintiff, a rule for a new trial was moved for and refused, and judgment rendered on the verdict. Appeal, on the ground of error in the judge in rejecting competent evidence.

No counsel for plaintiff.
Gilmer and Miller for defendants.

NASH, J. In the trial of this cause below, the only error committed, that I can perceive, was in receiving evidence of the handwriting of Staly, the subscribing witness, to prove the execution of the papers offered in evidence by the defendant. The testimony, however, was
(4) not objected to by the plaintiff, and, of course, it was received by consent. The error, therefore, was not in the action of the court; and neither party can now object to it. The general rule of evidence is that when a deed or other paper-writing is attested, it must be proved by the attesting witness, if he is capable of being examined. If not so capable, proof of his handwriting will be sufficient. 1 Phillips Evidence, 473. Among the causes enumerated by Mr. Phillips for ad-

mitting proof is that of an interest acquired by the witness since his attestation. In *Godfrey v. Morris,* 1 Strange, 36, the attesting witness had, subsequently to his witnessing the bond upon which the action was brought, become the administrator of the obligee, and he was, therefore, plaintiff in the action. His handwriting was proved, because the interest had been created by the act of the law; it was thrown upon him by law, and was assumed for the benefit of others. And the rule has been extended to cases where the witness, after attestation, married the plaintiff, who sought to establish the instrument. *Bulkley v. Smith,* 2 Esp., 697. But in no case that I have been able to find does the rule operate where the party seeking to prove the instrument has created the disqualification, or been the means of doing so, under circumstances justly subjected to suspicion of fraud. In other words, the circumstances must be free from all suspicion of fraud. This principle was adopted in our State at an early period. In *Hamilton v. Williams,* 2 N. C., 139, in an action on a bond, the attesting witness had become an assignee, and plaintiff offered to prove his handwriting, but the evidence was finally rejected by the court. The same question presented itself in *S. v. Bynum,* 3 N. C., 328. Defendant had executed the bond on which the action was brought, to James Short, and it was attested by John Short, who was the assignee of James, and who assigned it to the plaintiff. The question was whether the execu- (5) tion of the bond could be proved by proving the handwriting of the subscribing witness and that of the obligee. The Court decided it could not. HALL, J., in delivering the opinion of the Court, said that the case was not at all like those where the subscribing witness was dead, etc., "for such disqualification was not brought about by the agency of the obligee." He then assigns the reason: "If such proof were competent, a forged bond may easily be established against any one without swearing to a falsity." In *Johnston v. Knight,* 5 N. C., 292, the principle is again affirmed, the Court, in its opinion, observing, "The subscribing witness is selected by the parties to bear testimony to their contract, in case a dispute should arise; that his production has been dispensed with only in cases of necessity, as where he is dead, etc., or become interested by operation of law. But the necessity, in this case, arises entirely from the act of the person (or, at least, with his concurrence) who offers the lesser evidence, which certainly cannot, and should not, form an exception to the general rule." The same principle is recognized in our sister state of Alabama, *Bennet v. Robinson,* 3 Stev. & Porter, 227. *Best, J.,* in *Floville v. Stephenson,* 5 Bing., 493, observes: "But in the present case the witness has only obtained an interest in the contract which he was to prove, and *that interest he derived* immediately from the plaintiff, who proposed to call him.

Plaintiff cannot complaint that his witness is disqualified, when he himself has been the cause of the disqualification." See Phillips Ev., 466, and the note by Cowen & Hill, 881, pp. 1265-66, where the above cases are collected and commented on. They fully prove the position that where a witness to a contract, subsequently to his attesta-
(6) tion, acquires an interest in the contract, through or under one of the contracting parties, he is an incompetent witness for the party so creating the interest, unless the circumstances entirely negative the idea of any fraud, as in *Bulkley v. Smith*, 2 Esp., 697; nor can his handwriting be proved by such party. The facts in this case bring it completely within the rule established in those referred to, and show the extreme danger of admitting the evidence offered. Coble claimed the property in question by a purchase from the intestate, and Staly was a witness to the alleged conveyance, and to him Coble sold it. Plaintiff produced evidence to prove that the paper purporting to be such conveyance was a forgery, made after her death. To sustain that conveyance, it was proposed to give in evidence the declarations of Staly. Could a case be described more emphatically calling for their exclusion? The interest of Staly was acquired from Coble, and after his attestation. To admit such evidence would be to open a very wide door to fraud, as it is a rule of law that where proof of the handwriting of an attesting witness is admissible, it is evidence of the execution of the instrument, and the sealing and delivery of it will be presumed. 1 Phil. Ev., 574. Staly was not a competent witness for defendant Coble, nor was the latter entitled to prove his handwriting. It follows, as a necessary consequence, that his declarations concerning the execution of the papers was not evidence for his codefendant nor himself, he being a party to the record. His Honor committed no error in rejecting the testimony offered.

The proposition of the defendant as to the declarations of Coble was too broad. All that he said at that time upon the subject to which his declarations, as proved by the plaintiff, related, would have been com-
petent. But defendant did not so qualify his proposition. As
(7) stated by him in his bill of exceptions, he wished to prove *all* that he said at that time. It might have embraced declarations irrelevant to the issues, or, if relevant, not connected with the declarations proved by the plaintiff, and forming no part of them. A party wishing for a *venire de novo*, because of testimony improperly rejected, must in his bill of exceptions set forth what the evidence was that he tendered, and not its effects, to enable the Court to see its relevancy. This evidence was properly rejected.

PER CURIAM. Affirmed.

Cited: S. v. Purdie, 67 N. C., 328; *Roberts v. Roberts,* 85 N. C., 11; *S. v. Pierce,* 91 N. C., 609; *Whitmire v. Heath*, 155 N. C., 306; *In re Smith,* 163 N. C., 466.

WILLIAM C. EMMIT v. JOHN J. McMILLAN.

The same strictness is not required in the description of a note in a warrant from a justice of the peace, as is required in a description in a declaration in court. It is sufficient if the warrant describes the cause of action so as to bring it within the jurisdiction of a single justice, as defined by statute.

APPEAL from *Bailey, J.,* at Fall Term, 1851, of BLADEN.

Appeal from judgment of a justice to the county court, and thence to the Superior Court. The following facts appeared: On 8 December, 1848, plaintiff commenced this suit by warrant, for nonpayment of $75 and interest from 1 April, 1847, due by note. On 15 December, 1848, judgment was rendered thereon by a justice of the peace in favor of plaintiff against defendant, for "the sum of $75 and interest (8) from 1 April, 1847, till paid, and costs," and defendant appealed to the county court, and then pleaded *non est factum* and payment. While the case was pending in the county court, the note on which the suit was brought was lost in the clerk's office, and, upon the trial in the Superior Court, the loss was sufficiently established to let in evidence of its contents and execution. For that purpose plaintiff offered the magistrate who tried the warrant. He stated that the instrument was produced on the trial before him, and was not attested, but that he was well acquainted with defendant's handwriting, and by that means knew that the note was executed by the defendant; and that it was dated 15 April, 1847, and was for $75, and payable one day after date, and that he gave judgment for the debt, and interest from 15 April, 1847, according to the note. On this evidence counsel for defendant insisted there was a variance between the note as described by the witness and as set forth in the warrant, the one being payable on 16 April, 1847, and the other on the 1st day of that month; and the court was of that opinion, and nonsuited the plaintiff, and he appealed.

D. Reid for plaintiff.
Strange for defendant.

RUFFIN, C. J. The Court considers the judgment to be erroneous. The statute gives jurisdiction to a justice of the peace of debts and demands of certain amounts due by bond, note, or account, and for work

and labor done, etc.; and the jurisdiction is to be exercised upon warrants, which shall express "the sum and how due." There is no other process required, nor any declaration; and the object of thus expressing the sum, and how due, was obviously to bring the matter within the jurisdiction of the magistrate, as prescribed in the statute.
(9) Hence, warrants never add to the description "due by bond," or note, or the like, any further description: in respect, for example, to date, place, day of payment, coöbligor, or any other matter requisite to the complete identity of an instrument in a declaration. This warrant, therefore, is sufficient on its face, according to the statute and universal usage. If, however, a party will needlessly undertake to describe the instrument minutely in the warrant, as he would in a declaration, he may with propriety be held bound to prove it accordingly. But this warrant does not purport to enter upon any such description of the note, saying only that the sum demanded for debt and for interest thereon was "due by note," without giving date or day of payment of the note, or its tenor in any respect. It is supposed that it describes the day of payment in giving a day from which the interest was to run. But that is merely an inference from the fact, usually, interest accrues from the day fixed for the payment of the principal. That, however, is not necessarily so; for often the debt becomes payable at a particular day, with interest thereon from a previous day. It is true, the magistrate does not state that to have been the nature of this note. But it is not material to the point before us, which is, whether the warrant professes to describe the note in that particular. And it certainly does not, except by the inference insisted on, which will not hold good in all cases. Indeed, it is obvious that the memory of the witness was at fault as to the day of payment. He fixes it on 15 April, and yet he says that the judgment was given according to the note; and upon its face the judgment is for interest from 1 April, as demanded in the warrant. The strong probability is that the judgment accorded with the note, which was under the eye of the witness at the
(10) time of giving the judgment; and the jury might well have supposed that he was mistaken in his recollection at the trial of the day of payment. But it is not material to this question, for whether the note was the one way or the other, it was equally within the description required by the statute, and actually contained in the warrant, and therefore the supposed variance did not exist.

PER CURIAM. *Venire de novo.*

Cited: *Williams v. Beasley*, *post*, 113; *Parker v. Express Co.*, 132 N. C., 130.

LEWIS B. PHILLIPS v. SAMUEL ALLEN.

When a debtor is committed to prison, and is permitted to take the prison bounds, the jailer is not under any obligation, while he continues in the bounds, to furnish him with provisions for his support, nor, of course, can the creditor at whose suit he is confined be compelled to reimburse the jailer for any sum so expended.

APPEAL from *Ellis, J.*, at Fall Term, 1851, of ROCKINGHAM.

Assumpsit, commenced in the county court, in which the damages demanded were $200, and on nonassumpsit pleaded, the plaintiff had a verdict for $30.60; and from the judgment he appealed. On the trial in the Superior Court the case was this: One Joyner was committed in execution, at the suit of the defendant, to the jail of Rockingham, which was kept by the plaintiff, and, being required by Joyner, the plaintiff supplied him with diet up to 9 August, 1849, and his (11) fees therefor came to the sum of $30.60. On that day Joyner gave a bond for keeping the rules of the prison, and thereupon he was allowed until 29 November, 1849, and then he took the oath of insolvency, and was duly discharged out of execution. During the period between 7 August and 29 November the plaintiff continued to supply Joyner with food, and he was unable to pay any part of plaintiff's charges. After Joyner's discharge the plaintiff demanded payment from the defendant for the whole time, which the latter refused.

The court instructed the jury that the defendant was liable for the fees for the time Joyner was a close prisoner, but not for any afterwards; and plaintiff again had a verdict, and judgment for $30.60, and appealed to this Court.

Morehead for plaintiff.
Gilmer, Kerr, and Miller for defendant.

RUFFIN, C. J. His Honor's instruction was right. It is true that in the act of 1741 it is provided that one in the prison bounds "shall be adjudged a true prisoner." But that is said in respect to the officer's liability for an escape, and has no reference to anything else. A person in the bounds was not such a prisoner as was, under the act of 1773, entitled to take the oath of insolvency or to call on the jailer for diet, and charge the creditor with the payment therefor. As to the first point, *Howard v. Pasteur,* 7 N. C., 270, is an authority. Indeed, the act of 1818, after reciting doubts whether a debtor who once took the benefit of the rules could afterwards be discharged as an insolvent, provided that he might go into close prison in order that he might then

proceed, as a prisoner, to obtain his discharge, and it was not until the amendment to that act, in 1836, Rev. Stat., ch. 58, sec. 19,
(12) that the debtor could be admitted to his oath while within the rules and without going into close prison. Therefore, the term "true prisoner," in the act of 1741, did not control that part of the act of 1773 which provided for the discharge of an insolvent; but the latter act was construed upon its own terms, requiring close imprisonment. In like manner the present question depends upon the particular provisions of those acts which require a jailer to find a debtor, and give recourse on the creditor therefor. They are sections 8 and 9 of the act of 1773, and the act of 1821, amended in 1836, now forming section 6, chapter 58, Rev. Stat. The first was restricted to debtors "confined" in prison; and the last is explicit that "whenever any debtor shall be actually confined within the walls of the prison, it shall be the duty of the jailer to furnish such prisoner with necessary food during his confinement," and if the prisoner be unable to discharge the fees therefor, the jailer may recover them from the creditor. Thus the officer is not bound to furnish food for one in the rules, and, therefore, cannot charge the creditor therefor. The debtor, with that degree of liberty, is supposed, with reason, to be able to provide for himself by his labor, if by no other means of his own; and it was not intended that he should live in the bounds in idleness, at the expense of his creditor, instead of earning a living for himself. Consequently, plaintiff recovered all he was entitled to, and the judgment for that sum is to stand.

As the plaintiff, however, was the appellant to the Superior Court, and recovered there no more than he did in county court, he was not entitled to costs on that appeal. The statute, indeed, vests the discretion in the Superior Court to order him to pay those costs. That was not done, and this Court does not interfere on that point. But the act is peremptory that in such a case the plaintiff shall not
(13) recover the costs of the appeal, and to that extent it is the duty of this Court to modify the judgment. Consequently, the judgment for the damages, and for the plaintiff's costs in the county court, is affirmed; and the defendant is entitled to his costs in this Court.

PER CURIAM. Affirmed.

ABRAHAM ALEXANDER v. WILLIAM W. WALKER.

Under our statute (Rev. Stat., ch. 31, sec. 68), the deposition of an absent witness may be received in evidence whenever the witness has left the State, either with an intention of changing his domicile or under the expectation of being absent for a time which will include two terms of the court, say six months. But it cannot be received when the witness is absent temporarily for a short time, as in the case of a seaman on a voyage to New York or Charleston, when his return may be expected in two or three months at furthest.

APPEAL from *Dick, J.*, at the Spring Term, 1851, of TYRRELL. The case is stated in the opinion delivered.

E. W. Jones for plaintiff.
Heath for defendant.

PEARSON, J. This was an action of assumpsit for freight of goods. To prove the terms of the contract, defendant offered to read the deposition of a witness who was, at the time of the trial, absent from this State. Plaintiff objected. The facts are that the (14) witness was a seafaring man, whose residence was in this State, but his vocation required him frequently to go out of the State on a voyage, and after a temporary absence he would return, and then go out of the State again, as his business called him. An order was obtained to take his deposition. After it was taken, he went on a voyage, and returned, and then left again, and had not returned at the time of the trial. It was held in the Superior Court that the deposition could not be read, and for this the defendant excepts. By Rev. Stat., ch. 31, sec. 68, it is provided: "When any person who may be a witness in any civil case in any of the said courts shall reside out of the State, or shall, by reason of age or bodily infirmities, be incapable of attending to give his testimony in court, or shall be in a dangerous state of health, or *about to leave the State,* or be a prisoner confined in jail, oath thereof being made, the court shall issue a commission to have his deposition taken, which shall be received as legal evidence." By section 70 it is provided: "If any person who may be a witness in any of the said courts shall be under the *necessity of leaving the State* before such cause is to be tried, or even before such cause shall be at issue, or be in a dangerous state of health, upon oath thereof the court shall issue a commission to have his deposition taken, which shall be received as legal evidence." This is a reënactment of the act of 1777, and the question is, Does the deposition offered come within its operation? This statute makes an encroachment upon the common law, in reference to the trial by jury,

which is to be held sacred according to our "declaration of rights," of which it is a prominent principle that witnesses ought to be examined in the presence of the jury. We are bound, therefore, by a well settled rule of construction, not to carry this encroachment beyond the point to which it is clear the lawmakers intended to go.

(15) It is readily conceded that the expression, "*under the necessity of leaving the State,*" is not to be taken in its strict sense, but it is to have a liberal interpretation, as it is used in common parlance when it is said in reference to a man's business, "It is *necessary* for him to go from one place to another," because the word "necessity," taken literally, would confine the statute to very narrow limits.

So, on the other hand, it is very obvious that the expression, "about to *leave* the State," is not to be taken in the sense of the mere act of *going out* of the State, because this would give the statute a most unbounded operation, in which would be included the case of a merchant whose business called him to New York or Charleston, and who expected to be absent but a few weeks; and the case of a witness who, not being solicitous to face the jury upon a cross-examination, might find it convenient to visit a friend in Petersburg or Camden for a few weeks.

If the expression is taken according to the sense in which it is used in common parlance, it conveys almost the idea of being about to *remove* from the State and make exchange of domicile, for if it is asked, "Is A. B. about to leave the State?" the answer is, "No; he is going to the South on business, or he is going on a trip of pleasure, and to see the world." But as "move" is not the word used—and it would certainly have been the most apt term, if a change of domicile were required—we do not feel at liberty to confine the word "leave" to precisely the same signification. And as we cannot give to it the loose meaning of merely going out of the State, or the restricted meaning of removing from the State, we are forced to take the middle ground and give to it the signification, leaving the State either with the purpose of changing the domicile or being absent for so long a time as to make a post-

(16) ponement of the trial until his return inconsistent with the due administration of the law, as if the witness were to leave to go on a voyage to China or to seek his fortune (for a few years) in California. In putting a construction on this statute, we must look to the evil for which it was intended to give a remedy. It was this: By the common law, and according to the mode of trial by jury, no testimony could be heard unless the witness was in the presence of the jury, so as to let them judge, by his looks, his demeanor, his manner, on cross-examination, etc., what credit he deserved. In State cases this rule never has been departed from; but in civil cases it was found to be inconvenient in many cases, and thereupon the court of equity, in aid of the

common-law courts, assumed jurisdiction to order a commission, under which the deposition of a witness residing in a foreign country, or who was unable to come before the jury by reason of age or infirmity, or who was about to quit the kingdom, might be taken; and the parties are required, under the penalty of being in contempt of that court, to allow a deposition so taken to be read as evidence on the trial. The evil was the expense and delay incident to this application to a court of equity, and the remedy intended was to confer power on the courts of common law to have depositions taken, and allow them to be read in evidence, in all cases where it could be done by an application to a court of equity. In the pleadings in the English cases the phrase is, "about to *quit* the kingdom." This seems to be synonymous with "about to *leave* the State," and we are confirmed in our construction of the statute by the fact that all applications to courts of equity are put on the ground that the witness is about to quit the kingdom, either with the intention of residing abroad or of going to some *distant* country—for instance, the East Indies—which implies a long absence.

It is said to be a great hardship upon a seafaring man, even (17) although his voyages are confined to New York, Norfolk, or Charleston, and his absence is temporary (some three weeks at a time), to be required to give up his vocation and lose his place in a vessel in order that he may attend before the jury as a witness. This is true. But it is equally true that it is a great hardship on a lawyer, a doctor, or a schoolmaster, or a farmer, or a ferryman, to be required to leave his business and go from Currituck to Cherokee in order to give his testimony in presence of the jury; and yet such is the law. The fact is, every citizen is concerned in the due administration of the law, and is bound (as Lord Coke expressed it) "to do suit to the court of his sovereign," and must submit to the rule, "Private interest should yield to public convenience."

There is another matter which is worthy of consideration in its bearing upon the construction of this statute. For whose benefit was the statute made? Was it to favor the witness or the party who requires his testimony? Most obviously it was intended for the benefit of the party, and to save him the expense and delay of applying to equity. For if a witness reside abroad, or is unable from age or sickness to attend, or is about to leave the State, there is no process by which he can be subjected to any penalty, except in the last instance, upon the supposition that he returns, so that a *scire facias* may be served on him, requiring him to show cause for not attending as a witness. Assuming that the statute was made for the benefit of the party, it follows that a deposition should never be received when the party has it in his power to compel the attendance of the witness, by enforcing the penalty, and by an action for

damages; or where the party can obtain a continuance on account of the absence of the witness. It is a rule in the Superior Court to
(18) grant a continuance upon an affidavit that the witness is material, is absent without consent, and that the party expects to be able to have the benefit of his attendance at the next term.

We conclude, therefore, that the meaning of the statute is to allow a deposition to be received in evidence whenever the witness has left the State, either with an intention of changing his domicile or under an expectation of being absent for a time which will include two terms of the court—say six months, but that it cannot be received when the witness is absent *temporarily* (as it is expressed in the exception), by which we understand, on a voyage to Charleston or New York, when his return may be expected in two or three months, at furthest.

PER CURIAM. Judgment affirmed.

Overruled (under Laws 1881, ch. 279), *Barnhardt v. Smith*, 86 N. C., 481.

E. D. HAMPTON v. ISAAC BROWN.

Although a sheriff may have trover or trespass for goods seized in execution and taken from him by another, his deputy cannot. The law vests the property in the sheriff, because he becomes liable for the goods and the debtor is discharged. But the law charges the deputy with no duty to the creditor, and if he makes default in serving an execution, he cannot be sued for it, but his principal only. In such a case the deputy is not a bailee, as to the possession, but is merely a servant of his superior, and holds for him, and therefore has no action himself.

(19) APPEAL from the Superior Court of Law of DAVIDSON, at Fall Term, 1851, *Ellis, J.*, presiding.

This is an action of trover for a horse, and was tried on the general issue. The plaintiff was deputy sheriff, and had a *fieri facias* on a judgment in favor of one Hoffman against one Horne, by virtue of which he seized the horse. He did not, however, take the horse out of the possession of Horne, and the latter sold it to the defendant a few days afterwards, and, upon demand by the plaintiff, the defendant refused to give the horse up. Counsel for defendant insisted that the action would not lie, because the plaintiff did not keep the possession of the horse, but left it with Horne, from whom defendant purchased; and also because the defendant, if liable at all, was liable at the suit of the sheriff, and not of

the plaintiff. But the court instructed the jury that, upon these facts, the plaintiff was entitled to recover; and, after a verdict and judgment against him, defendant appealed.

Gilmer and Miller for plaintiff.
No counsel for defendant.

RUFFIN, C. J. Although a sheriff may have trover or trespass for goods seized in execution, which are taken by another, yet his deputy cannot. The reason why the sheriff has the action is that the debtor is discharged and the sheriff becomes liable to the value of the goods, and, therefore, the law vests the property in him. *Wilbraham v. Snow*, 2 Saund., 47. But the law charges the deputy with no duty to the creditor. If he makes default in serving the execution, he cannot be sued for it, but his principal only. On the contrary, when he takes goods on execution, the sheriff becomes answerable for their value to the creditor, and hence the property vests in the sheriff and not in the deputy. It was suggested that the deputy held as the bailee of the sheriff, and thus had a special property. He, however, is not a bailee in (20) the sense of having a possession of his own, but he is merely the servant of his superior, and holds for him. The plaintiff, therefore, has no property in the horse, and cannot have this action.

PER CURIAM. *Venire de novo.*

Cited: Willis v. Melvin, 53 N. C., 63.

MOSES DEAN v. JOHN KING ET AL.

1. Where, under the provisions of the act of 1848, ch. 38, three freeholders are appointed to lay off property of an insolvent debtor, to be exempt from execution, they have authority, under the words "other property," to set apart, for the use of the debtor, a mare and five hogs, provided these articles do not exceed $50 in value.

2. The act of 1844 includes, under the term "debts contracted," a bond given after 1 July, 1845, though the consideration of the bond had existed before that time.

3. Under the act of 1848, the insolvent debtor has a right to have allotments for his benefits made by the freeholders, from time to time, as his necessities may require, provided the allotments be made at intervals not unreasonably short.

4. Each allotment must be complete in itself, so as to designate all the articles allowed.

(21) APPEAL from the Superior Court of Law of GUILFORD, at Fall Term, 1851, *Ellis, J.*, presiding.

This is an action of trover for a mare and five hogs, and was tried on the general issue. The case is stated to have been as follows: Prior to July, 1845, the plaintiff was indebted to one of the defendants in a sum of money, for which he executed his bond in 1846. A judgment was afterwards given thereon by a justice of the peace, and a *fieri facias* issued, which came to the hands of the other defendant, and he, by virtue thereof, seized and sold the mare and hogs in 1849. Plaintiff alleged that these articles were exempt from execution, and, in support of his case, "he gave in evidence the allotment of three freeholders, regularly appointed in 1849, to lay off a provision for him under the act in favor of poor debtors, whereby, a few days before the sale by the constable, the property in question was assigned to the plaintiff." The defendants then gave in evidence a similar assignment of other property to the plaintiff, made about one year prior to that given in evidence by the plaintiff.

The defendants thereon insisted that the mare and hogs were liable to the execution, because, in the first place, the debt was contracted before 1 July, 1845, and the next, because the same allotment was, under the circumstances, contrary to law, and did not protect the property. Upon these grounds, the court instructed the jury that the plaintiff was not entitled to recover, and a verdict and judgment were rendered accordingly, from which plaintiff appealed.

No counsel for plaintiff.
Gilmer and Miller for defendants.

(22) RUFFIN, C. J. Neither of the statutes respecting insolvents exempts a horse *nominatim* from execution, and it is only in that of 1844, ch. 32, that hogs are mentioned. The case, therefore, turns on that act, and the general words of that of 1848, ch. 38. The act of 1844, "in favor of poor debtors," authorizes three freeholders, appointed by a justice of the peace, to lay off and assign to a debtor, who is a housekeeper, in addition to the property then exempt from execution, certain other articles, namely, the necessary farming tools for one laborer, one bed, bedstead and covering for every two members of the family; two months provisions for the family; four hogs, and all necessary household and kitchen furniture, not to exceed $50 in value; and directs them to make report thereof to the next county court. The property thus assigned is exempt from execution for debts contracted after 1 July, 1845. The subsequent act of 1848 is entitled "An act to amend and

consolidate the several acts heretofore passed in favor of poor debtors"; and, after exempting from execution, in the first section, a number of specified articles, it enacts in the second and third sections, in favor of every housekeeper complying with the act, that in addition to those articles "there shall hereafter be exempt the following property, and none other, to wit: one cow and calf, 10 barrels of corn or wheat, 50 pounds bacon, beef, or pork, or one barrel of fish; all necessary farming tools for one laborer; one bed, bedstead and covering for every two members of the family, and such other property as three freeholders appointed, etc., may deem necessary for the comfort and support of such debtor's family; such other property not to exceed in value $50"; and that the freeholders shall immediately make out a full and fair list thereof and return it to the clerk of the county court, to be filed among the records.

It will be observed that, while the act of 1844, in addition to the (23) specified articles, allowed furniture to the value of $50 to be laid off to the debtor, that of 1848, which professes to embrace the whole subject, and thereafter to supersede all the previous acts, suffers any "other property" to be thus laid off to the debtor, provided, only, that it exceed not in value the sum mentioned. Subject to that proviso, it was then competent for the freeholders to assign the mare and hogs to the debtor; and although the provisions for carrying out the purposes of the act seem to be very imperfect and leave a door open for much abuse, it is the duty of the Court to execute those provisions as far as they are capable of execution. As the tenor of the proceedings of the magistrate and freeholders is not set forth, nor any question made in respect of the value put on those articles, or in respect of their actual value, nor respecting the return thereof, or notice to the defendants, it is to be assumed that in those and all other points the allotment was admitted to be in conformity to the act, and sufficient save only in the two on which objections were taken at the trial. Upon these two, the opinion of the Court is opposed to that of the presiding judge.

Although the bond on which the judgment was rendered was given for money due on dealings which occurred before July, 1845, yet it was executed after that day, and, to the purposes of the acts, created a debt at that time. It is, ordinarily, the legal operation of a bond to create a debt *proprio vigore;* and it is declared as having that effect, without reference to other considerations. That must be especially true in reference to this question, for the date of the bond is the guide to the officer as to his duty in this respect, and it could not have been meant that a point of so much importance to the poor debtor should depend on the state of accounts between him and the plaintiff at remote periods before their settlement, which the officer would have no means of investi-

(24) gating and deciding properly. As far as we see, the bond was the only security for the debt; and, in a legal sense, the debt arose by force of the bond.

The Court holds, also, that the allotment of 1849 was not affected by that made in the preceding year, under the act of 1844. It is not stated at what period in 1849 the transactions took place. But it is to be assumed to have been after the act of 1848 was in force, and, indeed, the word "hereafter" put the act into operation in November, 1848. *Weeks v. Weeks*, 40 N. C., 111. Its provisions could not be affected by those of the act of 1844, which it professes to supersede, and, indeed, expressly repeals in the concluding section. But the Court is of opinion that the result would be the same if the two acts were compatible and subsisting together, or if both allotments had been made under the act of 1848. The great purpose of these statutes is to prevent a housekeeper and his family from being deprived of the immediate means of subsistence, by exempting from execution such things as the Legislature deemed requisite to the supply of the pressing wants of food and clothing, and such bedding as would enable them to subsist together. To effect that end, the special allowances must at all times be protected, or rather the debtor must have it in his power to get them protected; and as most of them are necessarily consumed in the intended use of them, it follows that when the articles, once allotted, are consumed in whole or in part, others of the like kind are to be exempted. But in order to exempt them, it is necessary they should be specifically laid off and reported by the freeholders; for the second and third sections of the act do not merely exempt certain quantities of particular kinds of articles, but, on the contrary, authorize articles uncertain, both in quantity and kind, to be laid off. Hence, all the articles must be designated specifically in the report.

Indeed, without such a designation, the officer would be continu-
(25) ally involved in difficulties as to what was or was not liable to the execution. Such being the object and nature of the proceedings, it is manifest that whenever an execution may come, the debtor is then to have the right to his portion. If there be no change in his effects since they were assigned, there will be no necessity for a new allotment, though a second for the same things can do no harm. But if there be such change in his effects or family, another allotment is indispensable to the purposes of the act. It is equally plain that each and every allotment must be in itself complete in designating all the articles allowed; since, if it were not so, successive allowances might enable the debtor to accumulate a fund beyond the bounty intended in the act, and the officer would be embarrassed as to the identity and value of the things mentioned in the different allotments and those remaining specifically. The conclusion, therefore, is that the second allotment in this case was proper, and

may have been indispensable to give the debtor the full benefit of the act; and supposing the allotment not to have been in itself otherwise defective, the plaintiff is necessarily entitled to this action.

PER CURIAM. Judgment reversed, and *venire de novo.*

Cited: Schonwald v. Capps, 48 N. C., 343; *Ballard v. Waller,* 52 N. C., 86, 87; *Lloyd v. Durham,* 60 N. C., 285; *Hill v. Kesler,* 63 N. C., 444; *Isler v. Kennedy,* 64 N. C., 531; *Frost v. Naylor,* 68 N. C., 326.

MONTEVILLE BOWEN v. JORDAN L. JONES.

An execution to which a sheriff of a county is a party—either plaintiff or defendant—directed to such sheriff, is null and void; and the sheriff is not bound to make any return thereon, and, consequently, cannot be amerced for neglecting or refusing to do so. *Collais v. McLeod,* 30 N. C., 222, cited and approved.

MOTION for a final judgment of amercement against the sheriff (26) of Tyrrell County for neglecting to make return of a *fieri facias,* at the instance of the plaintiff, against several persons, of whom the present defendant was one, returnable to June Term, 1851, of this Court. A judgment *nisi,* founded upon the affidavit of the clerk of this Court, had been entered against the defendant at the last term of the Court. It was now admitted that the present defendant was the sheriff of Tyrrell County at the time the execution issued, and that it came to his hands, directed to him as sheriff; and it was further admitted that he was one of the parties against whom the execution issued.

Smith for plaintiff.
Heath for defendant.

NASH, J. The *scire facias* recites that an execution issued from the office of the clerk of this Court in favor of the plaintiff against several persons, of whom the defendant was one, directed to the sheriff of Tyrrell County, which was not duly returned. Upon a sufficient affidavit, a judgment *nisi* was obtained against the sheriff, and the present proceeding is to make that judgment final. The defendant Jones is the sheriff of Tyrrell, to whom the execution was directed, and one of the defendants against whom it was issued.

The *fieri facias* was absolutely void and of no effect, and the defendant had no power or authority to execute it. At the common law, where the sheriff is a party—either plaintiff or defendant—the process must be

directed to the coroner of the county. Watson on Sheriffs, 37. Our Legislature has enforced this principle by positive enactments. The act of 1779, Rev. Stat., ch. 25, sec. 7, provides that where there is no
(27) person properly qualified to act as sheriff in any county, the coroner shall execute all process, civil or criminal; and where there is no sheriff or coroner in any county, or they shall neglect or refuse to execute process, it is the duty of the judge, either of the Superior or Supreme Court, upon proper application, "to authorize and command the sheriff of any adjoining county to execute and serve the process." Rev. Stat., ch. 31, sec. 59. The necessity of these legislative provisions has been experienced by every member of the legal profession. Without them it would be in the power of a corrupt sheriff or coroner to put at defiance the mandates of the law, where the former was a party to the process, or to abuse it to the oppression of the citizen. So important to the efficacy of the execution of the laws are these provisions deemed that in *Collais v. McLeod,* 30 N. C., 222, the Court declares "the process in such case, and everything done under it, null and void." So that a purchaser at the sheriff's sale acquires no title thereby. If, then, the process so directed is null and void, it follows, as a necessary consequence, that the officer is under no obligation to take notice of it, and can legally do no official act under it; he can, technically, make no return upon it. The penalty imposed by the act of Assembly, and which is sought to be enforced here, is imposed as a penalty for the neglect of official duty, and has not been incurred by the defendant Jones in this case. The facts in this case are admitted by the plaintiff, upon his motion for judgment upon the *scire facias;* and it was submitted to the Court whether, upon them, he was entitled to such judgment. We are of opinion he is not.

PER CURIAM. Judgment accordingly.

Cited: Heilig v. Lemly, 74 N. C., 252.

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(28)

AULAY McAULAY v. JOHN F. BIRKHEAD.

1. In an action on the case for the seduction of the plaintiff's daughter, it is competent for him to give in evidence, on the question of damages, the character of his own family, and also the pecuniary circumstances of the defendant.

2. In such an action it is not competent for the defendant to show that the daughter consented willingly to the seduction, or even that she, in fact, seduced the defendant - her consent not depriving the plaintiff of his right of action.

Appeal from the Superior Court of Law of Anson, at the Fall Term, 1851, *Bailey, J.*, presiding.

This was an action on the case brought by the plaintiff against the defendant for the seduction of plaintiff's daughter. The only witness offered in proof of the seduction was the daughter herself, who stated, in substance, that she was about 16 years of age when the defendant came to board at her father's house; that after he had been there about one month—without any previous advances made to her by the defendant, any presents made or any particular attentions on his part—she fell in love with him; that, being seated in the piazza after dark one evening, the defendant came out of the hall room to the piazza, where she was sitting, and told her he wanted to have to do with her; upon which she got up out of her chair and went into an adjacent bedroom and lay down upon the bed, and the defendant then had connection with her; that on two other occasions afterwards he had connection with her; that by some of these connections she was begotten with child, of which she was afterwards delivered; and that on none of the occasions was force used, nor any other persuasion by the defendant than as before stated, but that she yielded at once to the defendant's suggestion.

Plaintiff then offered to prove the general good character of (29) himself and his family, which was objected to by the defendant, but allowed by the court. Plaintiff also proved, by permission of the court, after objection by the defendant, that the defendant was a man of some substance.

The defendant insisted that the witness was not to be believed, but even if believed, her statement did not establish any seduction.

His Honor charged the jury that if they did not believe the witness, the plaintiff could not recover. But if they believed her story, the seduction was established; that if the defendant asked the witness to have to do with him, however, readily she might have assented, it was still seduction. Defendant's counsel then asked his Honor to charge the jury that if the witness herself was the seducer, plaintiff could not recover. His Honor replied there was no evidence of that kind to be left to the jury.

A verdict having been rendered for the plaintiff, a rule to show cause why a new trial should not be granted was moved for by the defendant, upon the grounds, *first,* error in the court in receiving evidence of the conduct and character of plaintiff's family; *secondly,* error in receiving evidence of defendant's pecuniary circumstances; *thirdly,* error in saying that, if the jury believed the statement of the witness, the plaintiff was entitled to recover; *fourthly,* error in saying that if the defendant

asked the witness to have to do with her, that was, of itself, seduction, however readily she may have assented; *fifthly,* error in refusing to charge that if the witness seduced the defendant, the plaintiff could not recover.

The rule was discharged, and judgment rendered for the plain-
(30) tiff according to the verdict, and defendant appealed.

Strange, for the appellant, contended that character in civil cases could only be given in evidence when put directly in issue, and cited 2 Stark., 215, and Saund. on Plead. and Ev., 436; *secondly,* that it could not be called seduction when the woman yielded without entreaty, persuasion, etc. (*Clark v. Fitch,* 2 Wen., 459); that mere connection was not, of itself, seduction; *thirdly,* that there was error in the judge in saying that there was no evidence of seduction on the part of the woman.

D. Reid, for the appellee, replied that the rule of evidence as to character in cases like this was an exception to the general rule (*Bedford v. McKowl,* 3 Esp., 119; 2 Stark., 721; 4 Phil., 218; 5th U. S. Dig., 750; 2 Marsh. Rep.); *secondly,* that the injury was to the father, and the consent of the daughter could not take away his right to redress.

Pearson, J. The gravaman of the action is that the defendant had connection with plaintiff's daughter, who was 16 years of age and a member of his household, and, in contemplation of law, his servant; whereby she became pregnant and was delivered of a child, by reason of which he lost her services. Plaintiff having proven these allegations, made out his case, and was entitled to damages to some amount.

Whatever bearing the forward and indelicate conduct of plaintiff's daughter ought to have had on the question of damages, it certainly had none on the question of his right of action. In respect to him, she had no right to consent, and her act in assenting to, or even procuring, the criminal connection was a nullity; so the defendant must stand as a wrongdoer, from whose act the plaintiff has suffered damage. There is *damnum et injuria.*

(31) This is a full answer to defendant's exceptions to the charge.

The exceptions to the evidence relate to the question of damages. If, in this action, plaintiff is confined to the damage suffered by the loss of service, it is clear that the character of the plaintiff and his family, and the pecuniary "circumstances" of the defendant are not relevant to the injury, and the exception of the defendant to the evidence is well founded. But if plaintiff has a right to ask for, not merely the damage suffered by the loss of service, but for such an amount as will be a fit compensation (as far as dollars and cents can atone for it) for a

parent's injury and a deserved punishment for a breach of social duty, then it is equally clear that the character of plaintiff and his family and the pecuniary "circumstances" of the defendant are relevant, and that his Honor did not err in allowing these facts to be put in the possession of the jury.

That exemplary damages can be given in an action of this kind is not an open question. An attempt was made in *Gilreath v. Allen,* 32 N. C., 67, to open the question in an action of slander, but the Court hold that the matter is settled, and observe: "It is fortunate that while juries endeavor to give ample compensation for the injury actually sustained, they are allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty." To enable juries properly to exercise this discretion, it is necessary to put them in possession of all the facts and circumstances connected with the parties as well as the act. If the plaintiff and his family are respectable—that is, have a good general character—the jury should know it, so as to enable them to judge of the degree of suffering and agony inflicted on them; and if, on the contrary, he is debased and has by his conduct exposed himself to the injury, the defendant, in mitigation of damages, is at liberty to prove it. So if defendant, besides violating the ordinary social relation, has violated the more intimate re- (32) lation of a boarder, or a teacher, or a physician, the jury should know it, so as to apportion the punishment. And, for the same reason, they should know his "pecuniary circumstances." A thousand dollars may be a less punishment to one man than a hundred dollars to another.

It was said in the argument that evidence of general character is not admissible except in such actions as put character in issue; and, consequently, such evidence could only be received in actions of slander. The expression is used in several of the text-books, but it is ill-conceived and inaccurate. Character is not put in issue in an action of slander, under the general issue. The speaking of the words is put in issue, under the plea of justification. If the words import a particular charge, the specific offense only is put in issue. *Sharpe v. Stephenson,* 34 N. C., 348. If the words are general, only a specific offense, of the kind embraced under the general charge, is put in issue. *Snow v. Wicker,* 31 N. C., 346.

Character is not brought into the question except upon the inquiry as to damages. Evidence of general character is not admissible except in those actions where the jury may, in its discretion, give exemplary damages. In such actions, upon the inquiry as to damages, for the purpose of regulating the discretion of juries, they should be put into possession of all the circumstances connected with the grievance. Thus,

the general character and conduct of the plaintiff and his family, and the pecuniary circumstances of the defendant, are relevant, and may be brought into the question by either party.

PER CURIAM. Judgment affirmed.

Cited: Pendleton v. Davis, 46 N. C., 99; *Sample v. Wynn,* 44 N. C., 322; *Kinney v. Laughenour,* 89 N. C., 368; *Johnson v. Allen,* 100 N. C., 138; *Tillotson v. Currin,* 176 N. C., 481.

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(33)

STATE v. WILLIAM J. LATHAM.

1. A man has a property in a dog, so that an indictment for malicious mischief in killing one will lie.
2. To support an indictment for malicious mischief in killing a dog, it must be shown that the killing was from malice against the master. It is not sufficient that it was the result of passion excited against the animal by an injury he had done to the defendant's property.

APPEAL from *Dick, J.,* at Fall Term, 1851, of BEAUFORT.

The case is stated in the opinion delivered.

Attorney-General for the State.
Donnell for defendant.

NASH, J. The defendant is indicted for malicious mischief in killing a dog belonging to the prosecutor. The facts are as follows: In the morning of the day on which the dog was shot, a hog of the defendant, being at the premises of the prosecutor, was worried and injured by the dog in question. On the afternoon of the same day the prosecutor, being in the woods in pursuit of squirrels, the defendant came where he was with his gun, and his dog following; very soon afterwards the prosecutor's dog attacked the hog, and while he was in pursuit the defendant shot and killed him.

(34) Counsel of the defendant requested his Honor, the presiding judge, to instruct the jury "that if the defendant shot the dog from anger, temporarily excited by the injury to his property, and not from mere ill-will to the prosecutor, although he might have disliked him, they should acquit him." His Honor directed the jury "that if the defendant shot the dog in defense of his property, they should acquit him; but if his motive was malice to the prosecutor, they should convict

him." Defendant was convicted. A rule for a new trial for misdirection being discharged, a motion in arrest of judgment was made by the defendant, and the judgment was arrested.

The case presents two points—one in arrest of judgment, the other for error in the charge. If his Honor was correct in his decision on the first, it will supersede the necessity of any inquiry into the other. We have looked carefully into the record and do not perceive any error in it of form or substance. The charge against defendant is set forth in proper and apt words to describe it. We are not informed what was the precise ground upon which the court below acted. We can find nothing in the record suggesting a difficulty, except it be the subject-matter of the charge, the malicious killing of a dog. By the old authorities a dog was not a subject of larceny, because it was without value. But, notwithstanding, it is a species of property, recognized as such by the law, and for an injury to which an action at law will be sustained. *Dodson v. Mock*, 20 N. C., 282. Many actions have been brought in this State and in England for injuries to such property. 2 Bl. Com., 393, 394. If, then, dogs be personal property, they are protected by the law, and the owner has such an interest in them as that he can protect and defend them; and the destruction of them from malice to the owner is, in law, malicious mischief. Seeing no error in the record, arresting the judgment below was erroneous, and such judgment is reversed.

We are of opinion that defendant was entitled to the instruc- (35) tion prayed by his counsel, and that his Honor erred in refusing it. The charge in the abstract was right, but his Honor ought, at the request of defendant, to have been more specific and applied the evidence in the case to the law. *S. v. Moses,* 13 N. C., 452. Where a charge is general as to its doctrines and correct, either party may call for special instructions, and it is error in the judge to refuse so to charge. *McRae v. Evans,* 18 N. C., 243. So if a part of the testimony is omitted in the charge, it is not error unless the judge's attention was called to it. *S. v. Scott,* 19 N. C., 35. Here the court was requested to instruct the jury that "If the defendant shot the dog from anger, temporarily excited by the injury to his property, and not from mere ill-will to the prosecutor, although he might have disliked him, they ought to acquit him." His Honor declined so doing, but simply stated, upon this point, that "If the defendant shot the dog in defense of his property, they should acquit him; but if his motive was malice to the prosecutor, they should convict him." The charge so worded was calculated to leave upon the minds of the jury the impression that the prisoner's *defense* rested upon the single ground of his killing the dog in defense of his property, whereas another and the real point, so far

as the crime alleged in the indictment was concerned, was, Did the defendant kill the dog from passion excited against the animal by the injury to his property, or from malice against the owner?

PER CURIAM. Judgment reversed, and *venire de novo.*

Cited: S. v. Newby, 64 N. C., 25; *S. v. Manuel,* 72 N. C., 202; *S. v. Holder,* 81 N. C., 527; *Moore v. Electric Co.,* 136 N. C., 555; *S. v. Smith,* 156 N. C., 630.

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(36)

STATE v. ROBERT M. ALLEN.

A defendant may be convicted on an indictment under the act of 1846-47, forbidding the removal of fences, etc., if it appear that the ground which the fence surrounds was in a course of preparation for making a crop, or used in the course of husbandry, though no crop was actually planted or growing on it at the time of such removal.

APPEAL from *Bailey, J.,* at Fall Term, 1851, of STANLY.

The case is sufficiently set forth in the opinion of the Court.

Attorney-General for the State.
Mendenhall for defendant.

NASH, J. This was an indictment against the defendant for removing a fence around the cultivated lands of the prosecutor. And the proof was that the prosecutor had cultivated the land or field in question under a fence in 1849, and in the latter part of the year sold the land to one Arthur A. Robinson, and rented the land from said Robinson for 1850. That while there was nothing actually growing in the field, and before the ordinary time for pitching the crop, which the prosecutor had rented the land on purpose to make, the defendant removed some 50 or 100 yards of the fence surrounding the field; and the prosecutor stated that he was thereby prevented from making a crop. Defendant contended that it was necessary to his conviction that there
(37) should be something actually growing in the field at the time of the removal of the fence; but the court being of a different opinion and having charged accordingly, the jury found defendant guilty, and a rule for a new trial being discharged and judgment pronounced on defendant, he prayed and obtained an appeal.

The act under which defendant was indicted declares, "That if any person or persons shall unlawfully burn, destroy, or remove any fence,

wall, or other enclosure, or any part thereof, surrounding or about any yard, garden, or *cultivated grounds*," etc., "he, she, or they shall be deemed guilty of a misdemeanor," etc. Ired. Digest Manual, 158—the act of 1846, ch. 70. Defendant did remove a fence, or part of it, from around a piece of ground in possession of the prosecutor, and which he had cultivated in 1849, and which, as stated in the case, he intended to cultivate in 1850. There was nothing actually growing in the field at the time of the removal, and that was done before the crop was pitched. The objection on the part of defendant is that there was no crop growing in the field at the time the alleged offense was committed. Neither the language nor the spirit of the act justify this restricted construction. The word "cultivated" may refer either to past or present time. A field on which a crop of wheat is growing is a cultivated field, although not a stroke of labor may have been done in it since the seed was put into the ground; and it is a cultivated field after the crop is removed. It is strictly a cultivated piece of ground. Mr. Bailey, in his Dictionary, defines "cultivate" to be "To till or husband the ground; to forward the product of the earth by general industry." Here the land had been prepared for tillage by being cleared and fenced in, and a crop had actually been raised upon it the year preceding. After a crop is removed from a field, it is often very important (38) to the owner as a pasture. Can it be presumed that the Legislature intended to withdraw such a field from its protection? Our best farmers have a rotation of crops, and, after they have gone through the cycle, rest the land by letting it lie in fallow; where, so resting, it is in course of husbandry and is cultivated ground, though no crop be then on it and the owner has no intention of raising anything on it at that time. And while lying in fallow it is, according to good husbandry, important it should not be trodden by beasts of any kind. To this end the fences must be kept up. That the Legislature did not have the intention attributed to them is further evidenced in the difference in the language in legislating on another subject, but connected with this. In making fences indictable, if not of the height directed by the act, they say, "That every planter shall make a sufficient fence around his cleared ground under cultivation," etc. (Rev. Stat., ch. 48, sec. 51), and by ch. 34, sec. 42, it is declared "That all persons neglecting to keep up and repair their fences during crop time, required by the act concerning fences," etc., "shall be liable to be indicted." These statutes, though originally passed at different sessions, yet being revised and reënacted at the same session, are considered in law but one act. Chapter 48 simply subjects the person offending against its provisions to a civil remedy in favor of the individual whose stock may be injured; chapter 34 makes the omission to keep up a fence at a particular period,

"during crop time," a criminal offense. With these two acts before them, it cannot be supposed the Legislature intended by the words "cultivated grounds" only such as had crops growing on them. But the grounds, to come within this meaning, must be enclosed, preparatory to being cultivated or for some purpose connected with its
(39) husbandry. To fences surrounding land not cleared or intended to be cleared, the act does not extend. Why they should not enjoy the same protection I cannot well see. Every man has a right to enclose his own woodland for the range of his own stock, to prevent them from straying off and mingling with others, and for the purpose of excluding the stock of others, and he is entitled to have it protected by the law. The Legislature might have supposed the right to compensation was a sufficient safeguard; but while extending the doctrine of malicious mischief to fences around cultivated grounds, it is not easy to perceive why it was so restricted.

PER CURIAM. Judgment affirmed.

Cited: S. v. Perry, 64 N. C., 306; *S. v. McMinn,* 81 N. C., 588; *S. v. Campbell,* 133 N. C., 641; *Combs v. Comrs.,* 170 N. C., 90.

ANANIAS ROBINSON v. GIDEON B. THREADGILL.

1. Although there be a special contract to do or not to do a particular thing, a party is not bound to resort to it to recover damages for a breach, but may declare in *tort*, and say that the defendant has neglected to perform his duty.

2. In the case of a bailment, the bare being trusted with another's goods is a sufficient consideration for the engagement, if the bailee once enter upon the trust and takes the goods into his possession. As where a man undertakes to collect notes for another, without mentioning any consideration, and takes the notes for that purpose, there is a sufficient legal consideration for the engagement.

APPEAL from *Bailey, J.*, at Fall Term, 1851, of MONTGOMERY.
The case is stated in the opinion of the Court.

(40) *Strange for plaintiff.*
Winston and Mendenhall for defendant.

NASH, J. This was an action on the case. Plaintiff put into the hands of defendant two notes on John H. Mask, of Anson County, which

defendant promised to collect or return. Defendant gave plaintiff a receipt in words and figures as follows, to wit:

"WADESBORO, 17 September, 1845.

Received of A. Robinson the following notes to collect or return, as an officer, against John H. Mask, for $15, with interest from 13 January, 1843, with a credit of $2 paid 15 September, 1842. Also one against John H. Mask for $13.65, with interest from 1 January, 1844.

G. B. THREADGILL, *D. S.*"

Plaintiff introduced evidence tending to show that Mask had property sufficient to satisfy the claims put into the hands of defendant, if ordinary diligence had been used. Defendant's counsel objected to the recovery, upon the ground that it had not been shown that defendant was an officer, nor was there any evidence to show that he was deputy sheriff. Plaintiff's counsel insisted that he had a right to recover against him as an individual. The court charged the jury that it was the duty of defendant, when he undertook to collect the notes put into his hands by plaintiff, to use ordinary diligence, such diligence as an ordinarily prudent man would exercise in the collection of his own money; that if he neglected to do this, and plaintiff by his negligence had lost his debt, they should find a verdict for the plaintiff. Under this instruction the jury found verdict for the plaintiff.

The defendant obtained a rule for a new trial, upon the (41) ground that there was evidence from the receipt itself that defendant was not only an officer, but that he was deputy sheriff, and, if so, that plaintiff could not recover against him, but must sue his principal.

This objection was not made upon the trial, but, upon the contrary, it was urged that there was no evidence that he was deputy sheriff, nor was there any instruction prayed that there was evidence to be submitted to the jury.

There was no evidence that defendant was deputy sheriff, other than the receipt.

With the motion for a new trial we have nothing to do. In this Court two objections growing out of the record have been pressed upon us. The action is in case. Plaintiff placed in defendant's hands several notes, for which he gave a receipt "to collect or return," neither of which he did. The first objection is that plaintiff has mistaken his remedy; he ought to have sued in assumpsit. Case is the appropriate remedy. Where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation and a consequential damage, an action on the case, founded on the *tort,* is proper.

Burnett v. Lynch, 5 Barn. & Adol., 609. *Bailey, J.*, in delivering his opinion in the same case, says: "Although there be a special contract, a party is not bound to resort to it, but he may declare on the tort, and say that defendant has neglected to perform his duty." In *Gorett v. Roderidge*, 3 East., 70, the same doctrine is held, *Lord Ellenborough* observing: "There is no inconvenience in suffering a plaintiff to allege his gravamen as consisting in a breach of duty arising out of an employment for hire, and bringing the action for that breach rather than upon the breach of promise." Saunders Pl. and Ev., 338. Here
(42) the law raised an obligation on defendant to do a particular act, to wit, to collect or return the notes, and he was guilty of a breach of that obligation. Plaintiff was at liberty to consider the breach of duty as his gravamen, and case was his appropriate remedy, though he might have sued in assumpsit.

The second objection is that there is no legal consideration for the contract on the part of defendant, as it was a simple promise on his part to do the act without reward, and he never entered upon its discharge. A consideration of some kind is absolutely necessary to the validity of every contract, but it need not be in money nor money's worth. In the case of a bailment, the bare being trusted with another's goods is a sufficient consideration, if the bailee once enters upon the trust and takes the goods into his possession. The leading case on this subject, and which has since ever been followed, is *Coggs v. Barnard*, Lord Raymond, 909. It is unnecessary to state the facts of that case; it is too familiar to the profession. In Smith's Leading Cases, the editors, in commenting on that case, state the principle, which is now the settled law, that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. Here defendant undertook a duty for plaintiff, that of collecting or returning certain notes. If nothing more had taken place between the parties, the agreement would have been a *nudum pactum*, binding upon neither. But it did not; plaintiff delivered to defendant and he took into his possession the notes mentioned in the case, for the purpose and under the obligation to collect or return them. By so doing he entered upon his trust, and the law imposed the duty of performing it. There *was*, then, in law a sufficient legal consideration for the promise of defendant.

PER CURIAM. Affirmed.

Cited: Bond v. Hilton, 44 N. C., 311; *Solomon v. Bates*, 118 N. C., 315; *Fisher v. Water Co.*, 128 N. C., 375; *Peanut Co. v. R. R.*, 155 N. C., 165; *Sprinkle v. Brimm*, 144 N. C., 402; *Mule Co. v. R. R.*, 160 N. C., 220.

(43)

DEM ON DEMISE OF JOHN THOMAS v. ABEL KELLY.

1. An action of ejectment does not abate by the death of the lessor of the plaintiff.

2. Where, upon the death of the lessor, some of the heirs come in and are made parties, and others refuse to do so, a nonsuit cannot be entered for that cause.

3. The defendant may, if he thinks proper, obtain a rule upon the heirs to give security for the costs, which the court will grant if they are in danger, as if the sureties to the prosecution bond already given are insolvent or in doubtful circumstances.

APPEAL from *Ellis, J.*, at a Special Term, 1851, of MOORE.

This is an action of ejectment upon the demise of John Thomas. After the making of the demise, John Thomas, the lessor, died; and at a previous term of the court his heirs at law, upon motion, were made parties plaintiffs. At the present term two of the said heirs came into court and entered a *retraxit;* whereupon their names were ordered to be stricken from the record. Plaintiff's counsel then asked leave to amend, so as to strike out the names of the heirs at law, and permit the suit to stand as it originally did, upon the demise of John Thomas. This motion was allowed and the amendment accordingly made. Defendant's counsel then objected to the further prosecution of the suit, upon the ground that Thomas, the lessor, was dead. The court was of opinion that the suit did not abate by the death of the lessor, but thought that the plaintiff ought not to be allowed to prosecute the suit further, but should be called and nonsuited; that the fiction in this form of action was intended for the useful purpose of trying the title of (44) the lessor to the premises; that no such purpose could be subserved by a further prosecution of this suit; that no one succeeding to Thomas claimed or asked or desired, so far as appeared to the court, that the title should be tried; that there was no responsible person plaintiff to comply with and perform the orders and rules of the court that should be made in the case; and that there was no one who could be attached for such costs as plaintiff might be ordered to pay during the progress of the suit; and for these reasons it would be an improper use of the fiction. In submission to which opinion, plaintiff submitted to a nonsuit and appealed to the Supreme Court.

D. Reid, Kelly and Haughton for plaintiff.
Mendenhall and Strange for defendant.

NASH, J. It is a well established principle governing the action of ejectment that the death of the lessor of the plaintiff does not abate the

suit, and for the reason that the right to carry it on is supposed to be in the lessee. Nor can the death be pleaded, since the last continuance; and if the action is prosecuted to judgment, it is not error. Adams on Ejectment, 289; *Turner v. Grey,* Str., 1058. The suit is or may be carried on precisely, and judgment rendered precisely, as if the lessor was still alive (*Mowberry v. Marge,* 2 Mumford R., 453), without taking any notice of the death of the lessor or of his heirs. Defendant may, however, if he thinks proper, obtain a rule upon the heirs to give security for the costs, which the court will grant if they are in danger—as if the securities of the prosecution are insolvent or in doubtful circumstances. *Carter v. Washington,* 2 Hen. & Mun. R., 31; Purvis & Hill, Do., 614. So fully does the law, for the purpose of carrying on the suit, consider the lessee of the plaintiff, that an action may be maintained in
(45) his name for the mesne profits, after the lessor or his heirs have been put in possession of the premises. *Holdfast v. Shepard,* 31 N. C., 222. His Honor who tried the cause below was aware that the death of Thomas did not abate the suit; but he was of opinion that there was no one who succeeded to his claim, and asked or desired, so far as appeared to the court, that the *title* should be tried; and, as there was no responsible person plaintiff to comply with and perform the orders and rules of the court that should be made in the case, and as there was no one who could be attached for such costs as plaintiff might be ordered to pay during the progress of the suit, the plaintiff ought to be called.

We think there is error in the opinion. The first reason assigned by his Honor is at variance with the record. Upon the death of the lessor, the lessee obtained permission to amend the declaration by adding counts upon the demise of the heirs. The names of the heirs—ten in number—are specified upon the record. Subsequently four of them withdrew their names as not being willing to carry on the suit. The names of the others remained, thereby showing that they were desirous so to do. There were, then, persons who succeeded to the rights of the lessor and wished the suit should proceed. Any part of the heirs were competent to carry it on, as an action on the demise of any one or more could be brought.

The second ground assumed in the opinion is equally untenable. There were persons who were responsible for the costs. By law, upon the return of a declaration in ejectment, before the defendant can be called on to plead, bond with good and sufficient sureties to prosecute, etc., must be filed by the plaintiff. A prosecution bond was in this case given, and no allegation or suggestion is made of its insufficiency. The costs then, are secured, and there are persons answerable for them. If his Honor was correct in the course he pursued, it
(46) would be much better for those who succeeded to the rights of

the lessor that the suit should abate upon his death, as in that case they would be responsible only for the costs of the plaintiff, whereas, by the judgment of nonsuit, they would ultimately be answerable for the whole.

We are of opinion that there is error in the opinion of the court below, as above pointed out. The judgment is

Per Curiam. Reversed, and *venire de novo.*

Cited: Blount v. Wright, 60 N. C., 90; *Scott v. Elkins,* 83 N. C., 428.

DUNCAN McRAE v. JOHN MORRISON.

1. A party may prove by his own affidavit the loss of any instrument, unless it be a negotiable paper.

2. The impression of a witness, who professes to have any recollection at all, is some evidence, the weight of which is a matter for the jury and will, of course, depend very much upon circumstances.

3. Assumpsit will lie for goods sold and delivered when the contract is reduced to writing, as well as an action on the special contract. If the sale is for cash, assumpsit may be brought forthwith; if on time, at the expiration of the term of credit. If a sale is on time, and a note and security are not given according to the contract, assumpsit will lie at the end of the time, or the party may sue before, when he must declare specially for the omission to give the note and security.

Appeal from *Bailey, J.,* at Fall Term, 1851, of Montgomery. (47)

Mendenhall for plaintiff.
Strange for defendant.

Pearson, J. This was assumpsit for bacon sold and delivered. The contract had been reduced to writing; the plaintiff alleged that the paper was lost, and to prove its loss, for the purpose of letting in parol evidence of its contents, offered his own affidavit. This was objected to, but was received. A witness then stated that the contract was for the purchase of a quantity of bacon sold and delivered by the intestate of the plaintiff to the defendant in the spring of 1835 or 1836—he was not certain which —but *his impression* was that it was in the spring of 1836; and his impression also was that it was upon a credit of twelve months, but of this he was not certain. He also stated that the bacon was delivered at the house of the intestate and was packed away in a hogshead by the defendant. The action was commenced in the fall of 1839. Defendant's

counsel insisted that the impression of a witness as regards time was no evidence, and moved the court to instruct the jury that there was no evidence to take the case out of the statute of limitations. The court declined giving the instruction, but told the jury that if they were satisfied that the bacon was sold and delivered in the spring of 1836 on a credit of twelve months, the statute did not bar. A verdict was rendered for plaintiff. Rule for a new trial discharged, and from the judgment on the verdict defendant appealed.

The practice of proving the loss of deeds and papers, other than negotiable instruments, for the purpose of letting in secondary evidence of the contents by the affidavit of the party, is well settled. As to deeds and bills of sale, it has not been drawn in question since the cases
(48) in 2 N. C. The reasoning applies with equal force to a contract in writing like the one in this case. The affidavit of a party who has custody of the paper is frequently the only evidence that can be given of its loss, and if it is not received, he must be deprived of his rights. There is no kind of objection to this mode of proof, when the purpose is simply to let in secondary evidence. It is different as to negotiable instruments, for, as is said in *Fisher v. Carroll*, 41 N. C., 488, "The loss of a deed, even in a court of law, may be shown by the oath of a party, so as to let in secondary evidence; and the only reason why the same practice is not followed in these courts, in reference to the loss of bonds and notes, is the want of power to require an indemnity as a condition to the judgment." The same distinction in regard to negotiable instruments is taken (*Cotton v. Beasley*, 6 N. C., 259) where it is held that in a court of law the loss of *a bond* cannot be proven by the party, *because it is negotiable*. In *Hansard v. Robeson*, 14 E. L. C., 20, this further reason is given when the action is against an endorsee: The holder has no *legal* right to require payment unless he delivers up the note, so as to give the defendant his remedy over. These cases are cited to show the peculiar reason for making negotiable instruments an exception; they fully establish the general rule in reference to all other papers, the contents of which it becomes necessary to prove by secondary evidence.

Another exception is because the court refused to instruct the jury that the impression of a witness, as regards time, was no evidence, and so there was nothing to take the case out of the statute of limitations. The impression of a witness who professes to have any recollection at all is certainly some evidence. The degree of weight to which it is entitled is a matter for the jury, and will, of course, depend very
(49) much upon circumstances. The witness in this case was not setting the time simply from his recollection of the contents of the paper, but his recollection was aided by the fact that he was present

at the delivery of the bacon. It was properly left to the jury to say whether the evidence satisfied them that the bacon was sold on a credit of twelve months and was delivered in the spring of 1836.

It is further objected that plaintiff ought to have declared specially upon the written contract, and could not maintain assumpsit for goods sold and delivered. There is no distinction between a parol and a written contract, unless the latter is under seal, when covenant is the proper action. If a promissory note be given for the price, the original cause of action is not merged; assumpsit for goods sold and delivered will lie, and the note may be used as evidence. *Stedman v. Goode,* 1 Esp. N. P. c., 5.

It is said by counsel for defendant that assumpsit for goods sold and delivered lies only when the price is due at the time of the delivery, and if by the agreement the price is to be paid at a future day, plaintiff must declare on the special contract. This distinction is unsupported by authority. The only difference between a sale for cash and a sale on time is that in the former case assumpsit may be brought forthwith; in the latter it cannot be brought until after the time of credit expired. *Hoskins v. Duperry,* 9 East., 498. In *Helps v. Winterbottom,* B. & Ad., 431, it is held, if a sale is made on time and a note and security are not given as agreed on, assumpsit will lie at the end of the time, or the party may sue before the expiration of the time, when he must declare specifically for the omission to give the note and security. In the present case the action is brought after the day of payment, and there is no reason for requiring the plaintiff to declare specially upon the written contract.

PER CURIAM. Affirmed.

Cited: Chancy v. Baldwin, 46 N. C., 79; *Wittkowsky v. Wasson,* 71 N. C., 459; *Copeland v. Fowler,* 151 N. C., 355.

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(50)

ABEL KELLY v. JAMES LETT.

1. When an act of violence of itself is complained of, trespass *vi et armis* is the proper action; when the consequences only are complained of, then case is the proper action.

2. In some cases the party may waive the trespass and bring case for the consequential damages, alleging that the act was *negligently* done. But where the act is alleged to be wilfully done, trespass is the only action. The right of election cannot exist except in cases where there is a separate and distinct form of action besides the trespass.

3. Where it is alleged that the plaintiff was the owner of a mill a short distance from one occupied by the defendant, on the same stream, and that the defendant *wilfully, and with intent to injure the plaintiff*, frequently shut down his gates, so as to accumulate a large head of water, and then raised them, by which means an immense volume of water ran with great force against the plaintiff's dam and swept it away: *Held*, that trespass and not case was the proper remedy.

APPEAL from *Bailey, J.*, at Fall Term, 1851, of MONTGOMERY.

Case for breaking and otherwise injuring plaintiff's milldam.

Plaintiff alleged that defendant, who owned a mill above plaintiff on the same stream, repeatedly shut down his gates, particularly on Sundays and at night, and, after the water in defendant's pond had accumulated to as large a head as possible, raised his gates and discharged his water in immense volumes, which ran with great force and violence, so as to injure plaintiff's dam below; and that these acts were done by defendant wilfully and with the intent to injure plaintiff, and that he was injured thereby.

(51) Plaintiff introduced witnesses who testified to facts sustaining the allegations in his declaration as to the wilful injury of the plaintiff by the defendant, and further, that very large volumes of water ran with great force and violence against plaintiff's dam below, by the sudden raising of defendant's floodgates attached to his dam, by which plaintiff's dam was carried off, or essentially injured; that defendant had been in possession of his mill from seven to ten years, and that plaintiff's mill and dam were about one-half mile below defendant's. Plaintiff was in possession and owned the mill below. Upon this evidence, defendant's counsel moved the court to instruct the jury that the action could not be maintained, as from the evidence the injury was immediate and wilful, and not consequential; that whatever injury was sustained was by the wilful and immediate act of defendant, and, therefore, that the action should be trespass *vi et armis*. This instruction the court declined to give, but instructed the jury that the action was well brought; whereupon the jury, under this instruction, rendered a verdict for plaintiff. Appeal by defendant.

Mendenhall and Strange for plaintiff.

D. Reed, Kelly, and Haughton for defendant.

(52) PEARSON, J. The declaration alleges that plaintiff was the owner of a mill about one-half mile below a mill, on the same stream, owned by defendant; that defendant repeatedly shut down his gates, so as to accumulate as large a head of water as possible, and then raised them, so as thereby to discharge an immense volume of water,

which ran with great force against the dam of plaintiff and swept it away; and that this was done by defendant *wilfully and with an intent to do the injury*. The only question is, Can an action on the case be sustained?

When the act itself is complained of, trespass *vi et armis* is the proper action. When the consequences only are complained of, then case is the proper action; or, as the rule is expressed in the books, trespass lies where the injury is immediate—case when it is consequential. There is no difficulty as to the rule. The difficulty is as to its application, and it sometimes requires an exceedingly nice perception to be able to trace the dividing line. But this case is settled by authority, and there is no occasion to resort to reasoning or to a discussion of principles. In *Scott v. Shepherd,* 2 Blackstone, 892, *Grey, C. J.,* cites a suit from the register, 95a of trespass *vi et armis,* for cutting down a head of water *maliciously,* which thereupon flowed down to and overwhelmed another pond, which is our case.

It is true that in some cases, although the injury be immediate, the party has his election, and may waive the trespass and bring case for the consequential damage: as if one take another's horse, he may elect to bring trover (which is an action on the case); or if one in driving his carriage run on that of another, although the damage is immediate, case may be sustained, alleging that defendant so *negligently* drove his carriage that it ran against that of plaintiff and did great dam- (53) age; and the defendant is not allowed to defeat the action by averring that the injury was more aggravated for that in fact he drove against the carriage of the plaintiff on purpose and with an intent to do the injury. *Williams v. Holland,* 10 Bingham, 116. But if the declaration alleges that defendant *took* the horse from the possession of plaintiff, instead of supposing that he found it; or that the defendant *wilfully drove* against the carriage instead of ascribing it to negligence, case cannot be sustained, because these allegations are inconsistent with the nature of that action, and it is simply an attempt to recover in case for a direct, wilful trespass, which is the peculiar subject of another form of action. To maintain case, you must waive your ground of complaint on account of the trespass. *Day v. Edwards,* 5 T. R., 648. It is apparent, then, that this right of election cannot exist except in cases where there is a separate and distinct cause of action besides the trespass. Admitting, for the sake of argument, this to be one of those cases, the plaintiff has no ground to stand on. He has not waived the trespass—that is the burden of his complaint. But it seems to us this is not one of those cases, and we are inclined to think that case could not be maintained, if the declaration had been ever so carefully or skillfully drawn. Suppose the defendant had planted a cannon on his dam and

wilfully fired at plaintiff's dam until it was demolished, it could not be distinguished from the present case—the only difference being in the kind of force. In the one, the dam is destroyed by metal propelled by the force of gunpowder; in the other, it is destroyed by water, propelled by the force of gravitation—the water being kept back on purpose to increase the head, and thereby add to the power of the propelling
(54) force. Both are neither more nor less than wilful trespass. And although the intent is not the test of liability, yet when the damage is immediate it is the test of the proper form of action. If the damage be immediate and the act is wilful, trespass is the only action.

There is no question that the doctrine by which plaintiffs in certain cases are allowed to waive trespass and bring case, which is finally settled by authority, is an indulgence granted on account of the difficulty of tracing the dividing line; and the principle is that the plaintiff may, without injustice to the defendant, take the most charitable view of the case. But this doctrine only applies when two causes of action are involved; then one may be waived and still leave ground to stand on; but if the case involved merely a cause of action for trespass, to allow an election to bring case would be an absurdity, as if one wilfully shoots down another's horse or commits a battery on the person.

PER CURIAM. *Venire de novo.*

Cited: Shaw v. Etheridge, 52 N. C., 227; *Haywood v. Edwards*, 61 N. C., 351.

(55)

FRILEY W. MOORE, ADMINISTRATOR, ETC., v. HEZEKIAH G. SPRUILL.

A contract was as follows: A. was to cultivate a plantation belonging to B. in the year 1849. A. was to furnish the means and materials to make the crop, as far as he was able, and such as were not furnished by him were to be furnished by B. At the end of the year B. was to sell the crop and have one-third, and then deduct all the expenses and pay the residue to A.: *Held*, that this was not a leasing of the land by the one party to the other, nor a case of hiring a laborer by the owner of the land. But the parties were joint owners of the crop; and B., having survived A., had a right to the property as joint owner, in order to dispose of it according to the contract.

APPEAL from *Caldwell, J.*, at Fall Term, 1851, of MARTIN.

This action is trover for some corn, peas, and beans, and on not guilty pleaded, the case was this: Keel and Spruill made a bargain for the cultivation of a plantation belonging to Spruill, in 1849, as follows:

Keel was to cultivate the land and furnish the means and materials to make the crop as far as he was able; and such as were not furnished by him were to be furnished by the defendant, and at the end of the year defendant was to sell the crop, and he was to have one-third, and then deduct all the expenses and pay the residue to Keel. Under the agreement the defendant put in several plough horses and furnished provisions and other things; and about 400 barrels of corn and some peas and beans were made and gathered. In January, 1850, Spruill made a contract for the sale of the corn at $2.15 a barrel, which was approved by Keel, but he died in February, before the delivery of the corn, and the crops remained on the land in possession of defendant, and he refused to deliver them to him, but delivered them to the purchasers in March following. The court held that the action would not lie, (56) and nonsuited the plaintiff, and he appealed.

Biggs for plaintiff.
Moore for defendant.

RUFFIN, C. J. This is not a case of leasing land by the one party to the other, nor of hiring a laborer by the owner of the land, as it seemed to the court. There was nothing said as to the payment of rent or wages, as such, either in money or parts of the crop. But, on the contrary, the terms of the bargain show it was intended that there might be, as in fact there was, a joint cultivation on joint account of the parties, with a particular provision for disposing of the crop in convenient time and manner, in order to close the transaction by paying the expenses out of the proceeds, and dividing the residue in the proportions agreed on. The value of the labor and provisions supplied by the defendant was thus a charge on the crop, and was not a personal debt of Keel, in the first instance, and would not become so except for his proportion of the loss in case the crop should not be sufficient to defray the expenses. The parties were thus joint owners of the crop, and the defendant, as survivor, had the right to the property in order to dispose of it according to the contract; and, therefore, the plaintiff ought not to recover.

PER CURIAM. Affirmed.

(57)

WILLIAM B. RHEM, ADMINISTRATOR, ETC., v. LEMUEL TULL ET AL.

Where A., being in embarrassed circumstances, purchased a tract of land from B. and paid for it, and then caused a deed to be made from B. to A.'s sons, with a view of defrauding his creditors: *Held*, the personal estate being exhausted and debts remaining unpaid, that A.'s administrator could not obtain a license from the court, under the act of 1846-47, to sell the said land for the payment of the debts, because the fraudulent conveyance was not made by the intestate himself, and the trust in the sons was one which could not have been sold by *fi. fa.* or attachment in the lifetime of A., nor could a court of equity interfere to enforce the performance. The only remedy for the creditor was by a suit in equity, founded not on the trust, but on the fraud, by which the property of A. had been withdrawn from the payment of A.'s debts.

APPEAL from *Bailey, J.*, at Spring Term, 1850, of ONSLOW.

The case is stated in the opinion of the Court.

James W. Bryan for petitioner.
No counsel for defendants.

PEARSON, J. This is a petition by the administrator of William Tull for license to sell the real estate under the provisions of the act of 1846, ch. 1.

The petition shows that the personal estate has been exhausted, and there are debts unpaid to a large amount. It sets forth that the intestate, a short time before his death, being much in debt, purchased of one Foy a tract of land at the price of $3,250, paid the purchase money, and for the purpose of defrauding his creditors caused the title to be made to two of his sons, who with the other children are made parties defendant. The defendant demurred, and the demurrer was sustained by the court, the petition dismissed, and the plaintiff appealed.

The demurrer raises the question, Does this case come within the operation of the act of 1846?

This statute makes an important change in the law relative to the real estate of deceased debtors. It evidently was the intention of the Legislature to give it a very comprehensive operation. This being the first case calling for its construction, we have devoted to it much consideration, with a desire fully to carry out the intention, and to avoid all difficulty hereafter, by taking a fair start.

(60) Section 11 enacts: "The real estate liable to be sold under this act shall include all rights of entry and rights of action, and all other rights and interests in lands, tenements and hereditaments which by law *descend to the heirs of the deceased*; and all lands which the

deceased may have conveyed with intent to defraud his creditors: *Provided,* that only such land shall be liable to be sold as would have been *liable to attachment or execution by a creditor of the grantor in his lifetime."*

The case before us is not embraced by either clause of this section. No right or interest, legal or equitable, descended to the heirs of the deceased. His two sons acquired the lands by purchase and not by descent; it was conveyed to them in trust for their father, with an intent to defraud his creditors. This trust was not fit to be enforced by a court of equity, and neither the father nor the other children could be allowed to set it up. In fact, it could not as a trust be recognized in favor of any person; a court of equity could not recognize and enforce it as a trust, even in favor of a creditor. The equity of a creditor for relief would not be based on the idea of such a fraudulent and corrupt trust, but upon the distinct ground of the fraudulent intent to withdraw the estate of the debtor from the payment of his creditors. As there was no trust which a court of equity could recognize, the administrator cannot under this clause entitle himself to the license to sell by claiming to represent the deceased debtor or his heirs, for in contemplation of law he had no right or interest, and of course nothing could descend to them.

The other clause of the section gives the administrator a right to a license to sell all land which the deceased may have conveyed with intent to defraud his creditors, under the idea of his representing them. We have noticed the fact that by this clause the personal representative has more power over land than he possesses over a chattel; (61) he is bound by the gift, and creditors can only impeach it by an action against the donee, as executor *de son tort.* This would be a strong argument in favor of allowing this clause to embrace any and every case of fraud in regard to land, but for the restriction which is put on such a latitude of construction by the *proviso.* This confines it to such land as would have been liable to attachment or execution by a creditor of the grantor in his lifetime. Here it is seen that the land contemplated is such as the deceased had conveyed as grantor, and such as a creditor could have reached by attachment or execution. The land in question is, necessarily, excluded from the operation of the statute on both these grounds. It was not conveyed by the deceased as grantor, nor was it liable to attachment or execution by a creditor, because the statute 13 Eliz. does not apply to it, for this plain reason: if the conveyance to the sons is treated by the creditors as a nullity, the title is still in Foy, the original owner.

But it is said, although the land in this case could not have been sold by execution under the statute of Elizabeth, yet there was a trust in favor of the deceased debtor which could have been sold by execution

under the act of 1812, Rev. Stat., ch. 45; and, as the administrator is intended to represent creditors, a liberal construction which is called for by the manifest intention to give the statute an extended operation, will include all lands which the deceased had conveyed or *caused to be conveyed*, with an intent to defraud creditors: *Provided*, it could have been reached by execution in the lifetime of the debtor.

To this view there are two fatal objections: *First*, the words of this clause evidently confine it to land which had been conveyed by the deceased and which would have been liable to be sold as land under
(62) an execution by the creditors of the grantor. *Secondly*, the land being, by the direction of the deceased, conveyed to his two sons in trust for himself, with an intent to defraud his creditors, was an attempt to create a trust, which failed because such a trust could not be enforced in a court of equity, as explained above, and, consequently, it was not such a trust as was liable to be sold by the act of 1812. That act includes only such trusts and equitable interests as are recognized and can be enforced by courts of equity. The purchaser comes in under the *cestui que trust* and acquires from him the trust, which draws to it the legal estate in the same way as if a court of equity had decreed a conveyance. Of course, it cannot apply where there is no trust which that court recognizes or will execute, even in favor of a creditor upon the footing of a trust. In this the operation of the act of 1812 differs from that of the statute of Elizabeth: there the land is sold and the purchaser takes title above, and in spite of, the fraudulent donee, the conveyance of the debtor being treated as a nullity, whereas, under the act of 1812, *the trust* is sold and is treated throughout as a valid, subsisting right, which may be set up and enforced.

In our case there is no such valid, subsisting trust, and the creditors must go into equity, not on the notion of a trust, but because the estate of the debtor has been put into the hands of third persons by a fraudulent contrivance.

PER CURIAM. The decree sustaining the demurrer affirmed.

Cited: Page v. Goodman, 43 N. C., 16; *Parris v. Thompson*, 46 N. C., 59; *Morris v. Rippy*, 49 N. C., 535; *Taylor v. Dawson*, 56 N. C., 90; *Smitherman v. Allen*, 59 N. C., 19; *Haskill v. Freeman*, 60 N. C., 588; *Wall v. Fairley*, 73 N. C., 467; *Worthy v. Caddell*, 76 N. C., 84; *Wall v. Fairley*, 77 N. C., 107; *Greer v. Cagle*, 84 N. C., 388; *S. c.*, 87 N. C., 379; *Eland v. Eland*, 96 N. C., 493; *Thurber v. LaRoque*, 105 N. C., 319; *Guthrie v. Bacon*, 107 N. C., 338.

(63)

STATE v. MOSES DEAN.

Where there was a conspiracy to commit an offense it is not competent on the trial of one of the conspirators to give in evidence the declarations of another conspirator made after the offense had been committed; because they were not made in furtherance of the common design.

APPEAL from *Ellis, J.*, at Fall Term, 1851, of GUILFORD.

Indictment under the statute for stealing a slave. The three first counts in the bill charged that the slave was the property of one Phillip G. Smith, and the fourth the property of one James White and James Brown. Defendant pleaded not guilty, and upon the trial at the present term of the court the solicitor called one Phillip G. Smith, the alleged owner of the slave, as a witness in behalf of the State, who testified that the slave Lewis ran away from his plantation in Anson County in October, 1850, and was not seen by him until he was taken out of jail in Tazewell County, Va., in May, 1851; that the negro belonged to him, and was brought back to this State.

James White, a witness for the State, swore that on 1 January last he and one James Brown arrested the slave Lewis in Guilford County and were making arrangements to carry him to jail in Greensboro as a runaway slave, when the prisoner passed by the house where they were, with his wagon. He asked some questions of the slave, and had a conversation with him and Brown. The latter stated to the (64) prisoner that they had no vehicle to carry the negro to jail in, and proposed to him to carry him in his wagon. After some further conversation the prisoner agreed to do so for the sum of $1.50, provided the witness and Brown would meet him on the road to Greensboro at the house of one Bowman, while he, the prisoner, should go by his residence and discharge the load which he then had in his wagon. After this the witness and Brown proceeded with the slave to the house of Bowman, and soon thereafter the prisoner drove up with his wagon, and went a hundred yards beyond the house before he stopped; that the witness carried the negro out, and the four proceeded on their way in the direction of Greensboro. No one at Bowman's saw the prisoner, it then being dark, and his wagon was stopped beyond the house. About a mile from the house of one Pegg on the road the prisoner made a proposition to turn back with the slave and keep him until a reward should be offered, and also said his horse was worried and the weather very cold. The witness and Brown opposed this proposition. The prisoner proposed to stop at Pegg's as they passed to get some liquor. As they approached the house he sent the witness and Brown in with a ten-dollar bill, which he gave them to buy liquor, and he drove on

about 75 yards beyond the house with the wagon before he stopped. It was still dark, and the witness and Brown bought the liquor and followed on after the prisoner. When they overtook him in the road, and they all drank together, the prisoner again complained of the cold and said his horse was too much fatigued to proceed. He also proposed to take the negro and keep him for a few days in a vacant house of his, in order to give time for a reward to be offered; said he would take the papers and would see when the reward was offered, and
(65) would then proceed to jail with him; that by waiting a while they might secure the reward, and he also said it would not do to let anyone see the slave in his possession, as it was against the law. The witness and Brown objected to this course at first, but subsequently assented. It was agreed that the prisoner should keep the slave until the weather changed and a reward should be offered. They all then went back to a vacant house, about a quarter of a mile from the residence of the prisoner, where they remained during the night with the slave. The next morning the witness and Brown returned to their homes, leaving the slave in the old house with the prisoner. On Saturday following the witness returned and asked the prisoner if he had carried the negro to jail. He replied that he had not; that no one knew where the slave was execept himself and another; that he could go to him then, and expected to do so again, and would shoot anyone whom he should discover watching him. He said they could only have gotten $5 by carrying the negro to jail. A few days after this the witness again saw the prisoner, who said that one Abram Weaver had taken the negro off where no one could get him. Subsequently the witness Brown and the prisoner were arrested under a charge of stealing the slave, and while in the jail together at Greensboro the two first told the prisoner that if he had taken the negro on to jail as agreed upon, they would not have been where they then were. To which he replied by requesting them to stick to what they had said, and should they all be convicted, he would come out and exculpate the witness and Brown, and take all upon himself.

Upon cross-examination, the witness said that he had heretofore made a different statement in his petition for a *habeas corpus*, and to various other persons; that on the night of 1 January, as they returned, he told Brown that the slave had escaped as they were carrying him to
(66) jail. This statement he said was made to several persons in pursuance of an understanding with the prisoner when they turned back with the slave. The witness was told that he would be released and made a witness against the prisoner if he would come out and tell all about the matter.

James Brown was next called by the State, who gave the same account of the arrest of the slave as the witness White, together with the contract with the prisoner to carry him to jail, their progress on the road to Greensboro, and turning back at the instance of the prisoner, with the other incidents spoken of by the witness. He saw the prisoner a few days after, and threatened to make the circumstances connected with the slave public. The prisoner said if he did that the witness and White would be punished, as they alone had been seen with the slave. He also said that no one knew where the slave was except himself and another. After this time he said that one Abram Weaver had come and taken the slave off with him.

Other evidence was given tending to show a conspiracy between Weaver and the prisoner.

Counsel for the State proposed to give in evidence the declarations of Weaver to a witness as to the manner of his getting the negro from the prisoner and carrying him to Virginia at the request and as the agent of the prisoner. These declarations were objected to by prisoner's counsel: *first,* upon the ground that no conspiracy had been shown between Weaver and the prisoner; and, *secondly,* because in no event would the declarations after the transaction, in the absence of the prisoner, and merely reciting the occurrences, be admissible against the prisoner. The court was of opinion that the acts and declarations of Weaver were admissible as confirmatory of the witnesses (67) White and Brown *so far* as they tended to prove a conspiracy between Weaver and the prisoner. And thereupon the witness swore that Weaver told him that he had gotten the negro from the prisoner and taken him over to Virginia as his agent.

Mr. Hamlet, for the State, swore to the same purport.

The court charged the jury, among other things, that if the prisoner received the negro from White and Brown under the pretense of carrying him to jail, but with the intention at the time of stealing him, and in this manner got possession of the slave and carried him off, he would be guilty as charged in the fourth count in the bill for taking from White and Brown, provided they should be of opinion that they had arrested him as a runaway slave and were in the act of carrying him to jail in good faith; that such a possession would constitute a sufficient property in White and Brown to the slave to sustain the charges in the fourth count in the bill; that such a property in them was not inconsistent with a general property in Smith at the same time; that if they all had the negro in possession, with the honest intention of carrying him to jail, and concluded to turn back and keep him till a reward should be offered, they would thereby lose the control which the law gave to them over the slave as a runaway so soon as they started back

with this intention; and the possession would at once rest exclusively in Smith, the general owner, and a subsequent taking from the old house would be a taking from Smith, should they believe that he was really the owner. Prisoner's counsel moved the court to instruct the jury that when White and Brown took up the slave as a runaway, the act was lawful, and they had a special property in him, to the extent of the reward given by law; and if they committed him to the custody of the prisoner for safe keeping until the weather should get better, (68) the carrying him away by the prisoner was not a larceny, but simply a breach of trust, as no larceny could be committed without a trespass.

The court expressed the opinion that this would be the law under the supposed state of facts, but that the evidence was that the object in keeping the slave away from jail was to wait until a reward should be offered, in addition to the reason concerning the weather, and that this would be such a breach of trust as would vest the property in the general owner. The jury returned a verdict of guilty on the fourth count in the bill, and not guilty on the first three. Prisoner's counsel moved for a new trial: *first*, because the evidence would not sustain the verdict; *second* and *third*, for misdirection and admission of improper testimony. The rule was allowed, and subsequently discharged, the court being of opinion that the declarations of Weaver tended to show a conspiracy between him and the prisoner to take the negro from the State and sell him. A conspiracy being the assent of two minds or more to do an unlawful act together, the admission of each one, separately, to that effect would be evidence of the combination of all; and such a conspiracy, when established, would tend to corroborate the two witnesses, White and Brown, and to characterize the previous acts of the prisoner. That though they had been admitted but for the former purpose, it was a restriction favorable to the prisoner. Judgment was then rendered against the prisoner, and he appealed. There was a verdict of guilty.

Attorney-General for the State.
John H. Bryan, Mendenhall & Morehead for the prisoner.

PEARSON, J. There was evidence tending to show that the prisoner had stolen the slave, and had procured one Weaver to take him to Virginia, and sell him, in 1851. The slave was a runaway and had been arrested by one White and one Brown, and they were the witnesses mainly relied on by the State to make out the case. A witness called by the State swore that in April, 1851, he went to Virginia in search of the slave; found him in the possession of one Lowder, to whom he had been sold by Weaver; committed the slave to jail and caused

Weaver to be arrested on a charge of negro-stealing. The State then offered to prove by this witness that, *after his arrest,* Weaver told the witness that he had got the slave from the prisoner and had taken him over to Virginia and sold him as his agent. This evidence was objected to on the part of the prisoner, "*first,* on the ground that no conspiracy between the prisoner and Weaver had been shown; *second,* because in no event would the declarations of Weaver, in the absence of the prisoner and *after the transaction* and *merely reciting the occurrences,* be admissible as evidence against the prisoner." The (71) court was of opinion "that the declarations of Weaver were admissible as confirmatory of the witnesses White and Brown, *so far* as they tended to prove a conspiracy between Weaver and the prisoner." The evidence was admitted, and for this the prisoner excepts.

The exception is well founded; and it is unnecessary to notice the other points or to state the case any further.

Admit it to have been proven that there was a conspiracy between the prisoner and Weaver, by which it was agreed that the one was to steal and the other was to take the slave to Virginia and sell him. The evidence of such a conspiracy was very slight, and his Honor seems to have considered it insufficient, for he puts the admissibility of the evidence on the ground that it was confirmatory of the witnesses *so far* as they tended to prove a conspiracy. But admit the conspiracy to have been proven, there is an actual impossibility that these declarations could have been used in *furtherance of the common design,* for they were made after the matter was over, and after Weaver was arrested, when it served his purpose to put the blame on the prisoner; and he was directly interested in making a statement according to which he himself could not be convicted under the statute. But apart from this peculiar circumstance, it is sufficient to say the declarations were not made in furtherance of the common design, and were, for that reason, inadmissible. This very point is decided, *S. v. George,* 29 N. C., 321, and the decision is so well sustained by authority and upon principle as not to call for another word.

PER CURIAM. Error.

Cited: S. v. Jackson, 82 N. C., 568; *S. v. Turner,* 119 N. C., 848.

(72)

WILLIAM HIATT v. WILLIAM H. SIMPSON.

1. An attachment, like a warrant, need not contain any certain day of return, and conforms to the statute if made returnable "within thirty days" from its date.

2. When a justice of the peace renders a judgment in a case where he has jurisdiction, everything is presumed to have been done which it was necessary to do in order to make the judgment regular; and his judgment, like a judgment given in a court of record, is in full force until reversed.

APPEAL from *Bailey, J.*, at Fall Term, 1851, of ANSON.

Case for taking and converting a certain quantity of lumber, belonging to the plaintiff, to the defendants' use. The defendants justified under an attachment, which one of the defendants, acting as an officer, professed to have levied upon it as the property of one Allen Chancy, and alleging that the conveyance from Chancy to the plaintiff was fraudulent against creditors. It was objected on the part of plaintiff, among other things, that the attachment was void, and was no protection to the defendant, and especially because, so far as the execution issuing upon the attachment is concerned, it was void, as it appeared upon the proceedings themselves that the judgment was rendered without any publication or other notice to the defendant in the attachment; and that the attachment itself was void because not made returnable to any particular day; and plaintiff offered to prove that the day mentioned in the attachment as that on which it was returnable had been interlined since its execution, fraudulently, by defendants, or one of
(73) them; but the court overruled both objections of the plaintiff, and held that the judgment in the attachment was good; that notice was necessary, but that *that* was to be presumed to have been given by the justice in this case who granted the judgment, and that the attachment was good without any particular day of return being mentioned in it, if it stated that it was returnable within thirty days, which it did, and that, therefore, the insertion of the particular day by the defendant or anyone else would make no difference. A verdict having been rendered in favor of defendants, and a rule for a new trial discharged and judgment rendered for defendants, the plaintiff appealed.

Strange for plaintiff.
D. Reed for defendant.

PEARSON, J. The attachment under which defendant justified was made returnable "within thirty days from its date," but did not specify any particular day for its return. Plaintiff insisted that it was void

by reason of this omission. The provisions in reference to the return of warrants and attachments, within the jurisdiction of a single justice, are expressed in the same words, "on or before thirty days after date thereof." *Duffy v. Averitt,* 27 N. C., 455, decides that a warrant need not contain any special day of return, and conforms to the statute if made returnable within thirty days from the date thereof. This, it seems to us, settles the question as to attachments, also.

It was contended by counsel for plaintiff that there is a difference between warrants and attachments which calls for a different construction of the same words, for in warrants the defendant may be notified of the return day by the officer, whereas in attachments the defendant is absent, and can receive no such notice, and, therefore, the day ought to be specified in the writ. The fallacy of the argument is (74) in this: A warrant is returned for trial and final judgment; an attachment is returned merely to possess some single justice of the case, whereupon it becomes his duty to cause advertisement to be made for thirty days, during all of which time the defendant may apply to him and replevy and enter his defense, so as to prevent final judgment. It might in some cases be convenient for the defendant in a warrant, if it specified a particular day for its return; it can never be so in an attachment if the defendant is absent, for he, of course, cannot know of it until the advertisement; but, in truth, a specific return day would be inconsistent in either case, as the process is returnable before *any* justice of the peace, and they are not presumed to have stated days or places for business.

A final judgment was rendered by the magistrate before whom the judgment had been allowed, after the expiration of thirty days from the time of the return. But it does not appear by the proceedings that due advertisement had been made, and the plaintiff insisted that, on this account, the judgment was void and, therefore, the defendant could not impeach the assignment of the debtor as void against creditors on the ground of fraud. The general rule is that there must be a judgment establishing the debt in order to impeach an assignment as void against creditors. It would seem, however, that an attachment forms an exception, and the officer at least may justify the levy under the writ, as he is thereby required to take the property into his possession before the judgment. But we pass by this question, for we consider the judgment valid. Chapter 31, sec. 108, Rev. Stat., provides: "Every judgment given in a court of record or before a single magistrate having jurisdiction of the subject shall be and continue in full force until reversed according to law." This puts judgments of single magistrates on higher ground than the judgments of inferior tribunals, according to the English law; and as the magistrate had jurisdic- (75)

tion in this case, everything is presumed to have been done which it was necessary to do in order to make the judgment regular, and his judgment, like a judgment given in a court of record, is in full force until reversed.

PER CURIAM. Judgment affirmed.

Cited: Spillman v. Williams, 91 N. C., 490; *Neal v. Nelson*, 117 N. C., 401; *Dunham v. Anders*, 128 N. C., 212.

THE BANK OF THE STATE OF NORTH CAROLINA v. THE PRESIDENT AND DIRECTORS OF THE BANK OF CAPE FEAR.

1. The maker of a promissory note, made payable on demand at a particular place, is not bound to pay it until it is presented at the place where it is expressed to be payable. And there is no ground for a distinction upon this point between notes made by a natural person and those made by a corporation. Nor can such a note be used as a set-off or offered as a payment to the maker unless so presented.

2. Corporations, though not mentioned in the Constitution of the United States, are within its provisions, as they are within the provisions of any other general law.

3. A legislative charter to a corporation is a contract of inviolable obligation, and no State can constitutionally pass any law impairing such contract.

4. The act, therefore, passed at the session of the General Assembly 1850-51, entitled "An act in relation to exchanges of notes between the several banks of this State," which declares that when a bank or its branch presents for payment a note of another bank, the latter may pay its note with a note or notes of the same, without regard to the place where the same may be payable, is contrary to the Constitution of the United States, and therefore void.

(76) APPEAL from *Caldwell, J.*, at Fall Term, 1851, of WAKE.

Assumpsit on a bank note for $100, dated 1 October, 1844, and payable to P. Rand, or bearer, on demand, at the branch bank of Cape Fear at Raleigh. Pleas, nonassumpsit and set-off; and a case agreed was submitted to the Court to the following effect: The note belonged to the Bank of the State at Raleigh, and the cashier, through a notary public, presented it at the branch bank of Cape Fear at Raleigh on 21 March, 1851, and demanded payment, and the cashier of the said bank then offered in payment two bank notes for $50 each, issued by the plaintiff and payable on demand, the one to the bearer at plaintiff's branch bank at Milton, and the other to the bearer at plaintiff's branch bank at

Wilmington, and refused to make payment in any other way. Plaintiff's agent refused to accept payment in that mode, and this suit was then instituted. The Superior Court gave judgment *pro forma* for defendant, and plaintiff appealed.

J. H. Bryan for plaintiff.
W. H. Haywood for defendant.

RUFFIN, C. J. The defense would not be available at common law under either issue. By presenting the note for payment an action arose to the plaintiff as the holder; and it is fully settled that a promissory note, made payable, in the body of it, on demand at a certain place, becomes due only upon a presentment at that place. Hence the offer of the two notes for $50 in payment did not amount to payment, nor do they bar by way of set-off. There was at one period a conflict of judicial opinions in England in respect to an acceptance of a bill of exchange, whether if given "payable at a particular place" it was to be considered a general acceptance or a special one, requiring pre- (77) sentment at the place named; and the point was not settled until the opinions of the lord chancellor and all the judges were taken on it in *Rowe v. Young*, 2 Bligh., 391, and 2 Brod. & Bing., 180. It was there held that a declaration on such an acceptance was bad because it did not aver presentment at the designated place. No one of the judges expressed a doubt that, notwithstanding some previous *nisi prius* cases, the law was that if one promise by his note to pay at a particular day and place, there must be a demand there. *Lord Eldon* explicitly laid that down as the established law, and he stated the reason to be that the place stands in the body of the instrument as a part of it, which must be declared on as it is, and proved as described in the declaration. Indeed, it is apparent that it is an important part of the contract; for when one engages to pay money generally, without mentioning a place for the payment, the law is that the debtor must seek the creditor, whether the payee or his assignee, and at his peril find him, in order to save himself from the payment of interest and an action. By specifying the place, both parties are saved the trouble, but especially the maker, as he knows where to take the money to meet his note at maturity. The law cannot be said to be settled in the United States exactly in the same way, as in some and perhaps most of the courts a distinction has been taken that the declaration need not aver the presentment at the place, but the want of it may be alleged as matter of defense, if a loss arose therefrom, and the debtor will be discharged *pro rata*; as if the note be payable at a bank and the debtor deposit the money there, and the bank afterwards fail. Without going through the cases in this country in detail it

suffices to refer to *Wallace v. McDonnell*, 13 Peters, 36, in which most of them were cited and considered by the Supreme Court as estab-
(78) lishing that rule, and it was then adopted. It has, indeed, been questioned both by *Chancellor Kent* and *Mr. Justice Story*, who hold the rule laid down in England to be the true one according to the plain sense of the contract. But it is not material which position is right in respect to notes payable at a certain day as well as place, since no one, either in England or here, has supposed that presentment of a promissory note was not indispensable when in the body it is payable on demand at a particular place, which is our case. Even the Court of Kings Bench, whose judgment in *Rowe v. Young*, as to the special acceptance of a bill, was reversed in the House of Lords, held this on demurrer to a declaration by the bearer of a note payable on demand against the maker in which presentment at the designated place was not averred. *Saunderson v. Bowes*, 14 East, 500. The judgment was founded on this, that the maker did not appear to have been in default before suit brought; and that has not subsequently been questioned anywhere. The cases in this country in which it was held that the declaration need not aver the presentment of a note payable at a certain day and place distinctly admit it is otherwise as to a note payable on demand at a certain place. It is expressly laid down in *Wallace v. McConnell, supra*, that upon a note of the latter kind the declaration must aver a demand at the place; and *Mr. Justice Thompson*, in delivering the opinion of the Court, gives the reason that until a demand the debtor is not in default, and so there is no cause of action. There is, therefore, now no doubt as to the common law in respect to notes of this kind made by a natural person, that the maker is not bound to pay them until presented at the place where they are expressed to be payable. And there is no ground for a distinction upon this point between notes made by a natural person and those made by a corporation. The reason is not less applicable
(79) to bills of an incorporated bank, payable on demand at different branches, which, for purposes of local accommodation, the law generally requires to be established upon shares of the capital adequate to meet the notes issued at the respective branches, in respect to which punctuality is of the utmost consequence to the public, and is usually enforced under heavy penalties. Every one knows that no individual or bank can at all times and everywhere discharge all outstanding liabilities, due and not due; which would make credit useless. Then each point of a banking institution, having branches, has its own liabilities and must have its own resources; and it can only fulfill its engagements to the public when left to manage its own funds without impediment from the law. If the funds appropriated to the business at one place, instead of being left for that purpose, may be daily diverted therefrom at the

pleasure of the holders of the notes of every other part of the institution, it would be manifestly impossible for the bank and its branches to meet their notes for any length of time. It is therefore apparent that the provision in the notes that they are payable on demand at the several branches is of their essence, and, consequently, there is at common law no liability on such a note but for not paying it, when demanded, according to its tenor.

The defense, however, is not founded on the common law, but upon an act passed at the last session of the Assembly, entitled "An act in relation to exchanges of notes between the several banks of this State." Yet the discussion of the rule at common law was not the less needful in order to a proper understanding of the nature of the contract constituted by notes in this form, and of the operation of the statute, if it be effectual. Its principal provision is that when a bank or its branch presents for payment a note of another bank, the latter may pay its note with a note or notes of the former, without regard to the place where the same may be payable. It is clear that the case (80) before the Court is within the act, and that the question is as to its validity. With all respect to the Legislature and every disposition to carry out its will, if reconcilable with the fundamental law, the Court is, nevertheless, constrained to declare this enactment to be plainly contrary to the Constitution of the United States, and, therefore, inoperative. It is so both upon the ground that the act violates a provision of the charter to the plaintiff and upon the principle that it interferes with and violates substantive provisions of the notes of the two parties, which can no more be done with respect to the contract of a corporation than that of a natural person. For the Court supposes it to be clear law that a corporation is, like an individual, bound by and may take benefit of the general laws, where it is within the reason of them, unless there be particular modifications in the charter. It is not doubted, for example, that a bank is within the statute avoiding usurious contracts, though no restraint as to the rate of interest it may take be expressed in the charter; for while there are stringent prohibitions against oppression on the needy by individuals with their limited means, much more must it be supposed to be contrary to the legislative intention that banks, with their large associated wealth and power of making the demand for money easy or tight, should be without restraint upon their exactions on borrowers. The charters, indeed, usually prescribe a rate of interest or discount. But such clauses have their operation in preventing the effect on the bank of a change of the rate of interest by a subsequent general law, and in making the corporation amenable to the State for a violation of its charter. They do not affect contracts with the banks, because there is no provision in them for the avoiding those on which a greater rate

(81) is reserved, but that is left entirely to the general law. Since, then, the restraints of general laws apply to corporations when they are within the reason of those laws, unless excepted, so they are entitled to all the benefits of those laws like other persons, unless excluded therefrom by the charter. It has been already shown that a natural person is not bound to pay a note made payable on demand at a particular place unless or until it be presented there, and that he is not bound to pay at another place, for the good reason that, except at that designation, he may not be prepared with the means for paying, and may not be able to raise them there without loss. Hence that part of the note is an essential ingredient in the contract, and a statute requiring the creditor in his natural capacity to take from his debtor in payment of a sum due to him at one place, which had never been there demanded, would be plainly incompatible with those two provisions in the Constitution which restrain a State from making anything but gold and silver coin a tender in payment of debts, and from passing any law impairing the obligation of contracts. Art. I, sec. 10. The statute under consideration is likewise within that clause of the Constitution, for, although that instrument does not mention corporations by name, yet they are within it, as a part of the general law, for the reason already given; and it has, accordingly, been repeatedly held throughout the Union, for example, that a legislative charter to a corporation is a contract of inviolable obligation within that instrument, and that a corporation created by a state may sue in the courts of the United States or of another state. The rights and contracts of corporations, therefore, have the full guaranty of the Constitution, and, consequently, this statute cannot be valid, inasmuch as it essentially changes the obligation of the notes issued by the plaintiff, by requiring them (82) to be taken up—in effect, paid—at a different time and place from those at which they are payable according to their terms and their legal effect when they were issued, which may be, and in most instances must be, to the prejudice of the plaintiff. Such modes of payment might, doubtless, be required in the charter, and it would then be at the election of the citizens to accept it or not. It is remembered that the late Congressional charter of the Bank of the United States provided that all the five-dollar notes, no matter where may payable, should be paid upon presentment at the bank or any branch. But without a clause of that kind in the charter, the Legislature cannot give to the notes of a bank a different effect from that legally arising from their terms when made, so as to work a prejudice to the bank. The plaintiff, therefore, was not bound to take the notes of its branches in payment of the note held by it, because those notes were not then and there due, and because, if they had been, they were not a constitutional tender. If

they had then, or at any time before this action was brought, been presented at the places at which they were payable, and payment could not be got, they would have been available as a set-off. But that was not done, and the case turns merely on the tender of the notes, under the act of 1850, at the defendant's banking house, without their having been presented at Milton or Wilmington. The act thus violates the contracts constituted between these parties by their respective notes, both in their letter and spirit, and is, therefore, unconstitutional.

Under the same clause of the Constitution the act is avoided for another reason. It happens that in the plaintiff's charter it is expressly provided "that bills or notes issued by order of the corporation, promising the payment of money to any one or his order, or to the bearer, shall be binding and obligatory on the same in like manner and with the like force and effect as upon any private person, if issued by him in his natural capacity, and shall be assignable and nego- (83) tiable as if they were issued by such private person." 2 Rev. Stat., p. 63, sec. 25. Now, the contract constituted by the charter between the State and the bank, though inviolable according to the Constitution, is in fact violated by the act of 1850, since, under the circumstances mentioned in it, a force and effect is given to the notes of the bank which differ from that which, as notes of persons in their natural capacity, they would legally have, which cannot be done.

Therefore, the judgment must be reversed, and judgment entered for the plaintiff on the case agreed, for the principal money, and interest from the day of the demand.

PER CURIAM. Reversed.

Cited: Nichols v. Pool, 47 N. C., 25; *S. v. Matthews,* 48 N. C., 458; *Streator v. Bank,* 55 N. C., 32; *S. v. Cantwell,* 142 N. C., 616; *R. R. v. Cherokee,* 177 N. C., 97.

(84)

DEN ON DEMISE OF CLEMENT JOHNSON v. JAMES FARLOW.

1. Where A. conveyed land to B., and subsequently remained in the actual adverse possession for more than seven years: *Held,* that A. could not recover without showing some color of title acquired after his conveyance to B., and that his possession was under that colorable title.

2. If A. could have shown that his colorable title and adverse possession commenced after his deed to B., that deed would not have estopped him, because the title so claimed would not have been inconsistent with that he conveyed to B.

JOHNSON *v.* FARLOW.

APPEAL from *Ellis, J.*, at Fall Term, 1851, of RANDOLPH.

Ejectment. Plaintiff and defendant both claimed under one McCracken. Plaintiff showed a deed from McCracken to himself for the premises in question. Defendant relied upon a title subsequently acquired by McCracken to the premises named in plaintiff's deed, by virtue of seven years open and adverse possession, accompanied with a color of title, which colorable deed he held and claimed under when he conveyed to the plaintiff.

It was in evidence that in the year —— McCracken acquired a good title by deed to the premises; that subsequently he conveyed them by deed to plaintiff's lessor, and afterwards remained in possession, claiming and using the land as his own for more than seven years, when he conveyed by deed of bargain and sale to one Smith and others, who regularly and successively conveyed to the defendant. And the question was whether McCracken could acquire title by a seven years possession under color of title held by him before and at the time he conveyed to plaintiff's lessor; and upon this question the court was
(85) of opinion with the plaintiff, for the reason that whatever color of title McCracken had when he conveyed to plaintiff's lessor was transferred by that conveyance, and because he was estopped to claim against his own deed.

There was a verdict for the plaintiff. Rule for a new trial was granted and discharged, when the defendant appealed to the Supreme Court.

Gilmer, Miller, and Morehead for plaintiff.
Mendenhall for defendant.

PEARSON, J. It is entirely clear that the plaintiff was entitled to recover. McCracken, after his deed to the lessor, had no color of title, and the adverse possession which he held was "naked." It is absurd to suppose that the deed under which he had originally acquired the land could serve his purpose as color of title after he had passed all of his estate, interest, and claim under it to the lessor. Color of title is *something* which purports to give title, but he had nothing of the kind. The deed to him was *functus officio*, except as one of the mesne conveyances of the lessor. If McCracken had taken a deed from a third person, that would have been color of title, and seven years adverse possession under it would, in the language of the cases, "have ripened it into a perfect title," thus originating which did not *exist* at the date of his deed, for the averment of this new title would not be inconsistent with the admission which he was bound to make, that his deed had passed the title to the lessor. He might well be heard to say, "I admit that I

passed the title to you by my deed, but I have since a new title, which had no existence at the time, and which, of course, I did not profess to pass to you."

PER CURIAM. Affirmed.

Cited: Everett v. Smith, 44 N. C., 306; *Reynolds v. Cathens.* 50 N. C., 439; *Eddleman v. Carpenter,* 52 N. C., 619; *Bickett v. Nash,* 101 N. C., 583; *Hallyburton v. Slagle,* 132 N. C., 950; *Wilson v. Brown,* 134 N. C., 404; *Call v. Dancy,* 144 N. C., 497; *Weston v. Lumber Co.,* 162 N. C., 200; *Brown v. Brown,* 168 N. C., 15; *Grimes v. Andrews.* 170 N. C., 524; *Shuler v. Lumber Co.,* 180 N. C., 650.

Dist.: Weil v. Uzzell, 92 N. C., 518; *Cuthrell v. Hawkins,* 98 N. C., 206.

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(86)

JOSHUA STANLY ET AL. v. GEORGE HENDRICKS.

1. Where, in consideration of a promise to pay the debt of another, the defendant receives property and realizes the proceeds thereof, the promise is not within the mischief provided against by the statute of frauds, and the plaintiff may recover on the promise or in an action for money had and received.

2. But it is otherwise where the new promise is merely superadded to the original one—not substituted for it.

APPEAL from *Ellis J.,* at Fall Term, 1851, of GUILFORD.

The case is stated in the opinion delivered in this Court.

Gilmer and Miller for plaintiff.
No counsel for defendant.

PEARSON, J. One Vass was indebted to the plaintiffs $21. Defendant was indebted to Vass $46, and the defendant promised plaintiffs to pay them the debt due by Vass when he should remove from a house of the defendant in which he was then living. Vass afterwards moved out of the house, but defendant did not pay plaintiffs, and thereupon they issued a warrant to recover the amount.

His Honor held that this promise did not come within the provisions of the statute of frauds. In this there is error.

The question is settled by *Draughan v. Bunting,* 31 N. C., 10. We presume the attention of his Honor was not called to it. It is there decided that if the plaintiff has a cause of action against another, to which the promise sued on is superadded, the statute (87)

applies, and to prevent its application the debt of the other must be discharged and the promise sued on be substituted for it. In this case the debt of Vass was not discharged. He continued the debtor of the plaintiffs, and the promise of the debt was superadded, and is a promise to pay the debt of another within the very words of the statute.

It was said by counsel for plaintiff that there was a *new consideration* for the promise of the defendant. Admit that Vass's removing from the house did amount to a consideration—the same case decides that makes no difference. It required no statute to make void a promise not founded upon a consideration. It is only in cases where there is a consideration to support the promise that the statute of frauds must be called into action.

The counsel cited *Thomas v. Williams*, 21 E. Ch., 133; *Edwards v. Kelley*, 6 M. & S., 204; *Casthing v. Aubit*, 2 Eat., 325, for the position that a new consideration takes the promise out of the statute. These cases, so far from conflicting with *Draughton v. Bunting, supra,* might properly have been relied on as authorities in support of the decision. The principle is this: When, in consideration of a promise to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against, and the plaintiff may recover on the promise or in an action for money had and received. For although the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an *original* and *distinct* cause of action. For instance, one holding property in trust to
(88) sell for certain creditors, finding that another creditor has an execution which overreaches his title and gives a lien by a prior test, says to him, "Permit me to go on and sell, and I will pay your debt."

PER CURIAM. *Venire de novo.*

Cited: Hicks v. Critcher, 61 N. C., 355; *Combs v. Harshaw*, 63 N. C., 199; *Threadgill v. McLendon*, 76 N. C., 27; *Mason v. Wilson*, 84 N. C., 54; *Whitehurst v. Hyman*, 90 N. C., 490; *Haun v. Burrell*, 119 N. C., 547; *Voorhees v. Porter*, 134 N. C., 605; *Peele v. Powell*, 156 N. C., 557; *Craig v. Stewart*, 163 N. C., 535; *Rector v. Lyde*, 180 N. C., 578.

JOSEPH WASHBURN ET AL v. HENRY HUMPHREYS.

Assumpsit for the reward offered by the following advertisement for the apprehension of a stolen negro and the felon: "A reward of $100 for the apprehension of both, or $50 for the negro out of the State; $25 for the apprehension of the negro within the State, and his delivery to the subscriber, or for keeping him so that his owner gets him again": *Held*, that the reward of $100 was offered only for the apprehension of the felon and the negro if taken without the State, and $25 for the negro if taken within the State.

APPEAL from *Caldwell, J.*, at a Special Term of GUILFORD in July, 1851.

The case is stated in the opinion of this Court.

Kerr for plaintiff.
Morehead, Gilmer & Miller for defendants.

PEARSON, J. Defendant had a negro stolen from him and offered a reward in these words for the apprehension of the felon, one Moore, and the negro: "A reward of $100 for the apprehension of both, or $50 for the negro out of the State; $25 for the apprehension of the negro within the State, and his delivery to the subscriber, or for keeping him so that his owner gets him again."

The plaintiffs apprehended both Moore and the negro within (89) this State, and put Moore in Rockingham jail and delivered the negro to the defendant, who paid them $25, but refused to pay the other $75, for which the plaintiffs bring this suit. His Honor thought plaintiffs were entitled to the reward of $100, and they had judgment for $75, and defendant appealed.

It is unnecessary to notice the other question made in the case. We differ with his Honor as to the construction of the advertisement. The meaning of the defendant is this: If the felon succeeds in getting the negro out of the State, when the risk of losing the property will be imminent, to stimulate exertion I will give $100, provided both are apprehended, or $50 for the negro. If he does not succeed in getting the negro out of the State, I will give $25 for the apprehension of the negro. His object was to secure the negro; he offers nothing for the apprehension of the felon either out of or in the State, unless the negro is apprehended; and if the negro should be secured before getting out of the State, then he leaves the felon to the vigilance of the citizens. This is a more reasonable construction than that he meant, if the negro was apprehended within the State he would give $25 for him, and the additional sum of $75 for the apprehension of the felon.

Our conclusion is aided by the grammatical construction. The words "out of the State" refer as well to the $100 for both as to the $50 for the negro, these two propositions being connected by the disjunctive conjunctive "or." It is further aided by the punctuation, for
(90) which purpose the original was sent. The only stop in the whole clause, except a comma, is after the words "out of the State," where there is a semicolon, indicating that the sentence is there divided.

PER CURIAM. *Venire de novo.*

HARRIET J. FOY v. THOMAS D. FOY.

1. As the allegations in a petition for a divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise, the Court cannot decree a divorce.

2. Where a petition for divorce is amended, the facts alleged in the amendment must be sworn to, or they will not be regarded.

3. If a wife leaves a husband and refuses to live with him, *without sufficient cause*, and he afterwards lives in adultery, this is no cause for granting her a divorce.

4. If a husband is accused of a crime, or if he is guilty of it, this is not sufficient cause for the wife to refuse to live with him, and she is not thereby justified in a violation of the marriage vow. She took him "for better or for worse."

APPEAL from *Dick, J.*, at Fall Term, 1851, of CARTERET.

The case is stated in the opinion of this Court.

(91) *Donnell for plaintiff.*

J. H. Bryan, with whom was J. W. Bryan, for defendant.

PEARSON, J. This is a petition for a divorce. The court granted a divorce, and from this decree the defendant appealed. The facts were these: The parties were married in January, 1844, and lived together until June of that year, when, as the petitioner alleges, the defendant committed the crime of forgery, and his guilt being discovered soon thereafter, he abandoned "and deserted your petitioner, and left her dependent upon the care and protection of her mother, with whom she has lived ever since." "That since your petitioner was thus deserted by the husband, he has lived in the county of Jones, keeping himself concealed as much as possible during the day and indulging himself in his vices at night, and does not venture to the county of Craven, where

your petitioner resided at the time he separated himself from her, and still resides." The petitioner then avers that "Since the defendant separated himself from her, he has given himself up to dissolute habits and has been and is living in adultery with a negro woman, or slave, the property of ————." Several other specific charges of adultery are made, but it is not necessary to state them. Upon these allegations the petitioner prays for a divorce from the bonds of matrimony.

The defendant admits that in June, 1844, he was charged with (94) having committed forgery, but he says the accusation being made known to his wife, "she either did not believe it or, if she did, it did not prevent her from living with him for some time thereafter upon the best and most conjugal terms," professing and, as he believes, feeling a warm and devoted attachment for him, and he positively denies the allegation that he separated himself from or deserted and abandoned the petitioner in 1844 or at any other time; on the contrary, he says, although they have not lived together for some time, "yet he has used every means in his power to induce the petitioner to perform her duty as a wife, and share his bed and fortunes, but she has abandoned him and refuses to live with him and give him her society." The defendant avers that "he deeply regrets her course of conduct, and he verily believes that if the petitioner had been left to her own feelings, she would not have deserted and refused to live with him"; but he says, "she, having a competent means of livelihood by the marriage settlement and large expectations from her mother, has been induced by her and others unfriendly to him to disregard her marriage vows, and to refuse to live with him"; that the petitioner "has resided for several years with her mother, which for some time she was forced to do, and at one time was actually prevented, by force, from going to the defendant, where he resided." He further says, "while he deplores this state of things, and might well palliate any indiscretion as being brought about by it," yet he denies the allegations of his having committed adultery; and he has at all times desired, and still desires, that she should return and live with him, as her duty as a wife requires.

Seventeen issues were submitted to the jury. It is only neces- (95) sary, for the purpose of our decision, to state one of them. "To the third issue, the jury respond and say that the defendant did separate himself from the petitioner and live in adultery with a negro slave named Hannah." This finding is "general" as to *the time* of the separation. If it be taken to mean that the separation was in 1844, or at any time before August, 1845, it is directly opposed to the charge of the court, for his Honor instructed the jury: "Taking the evidence to be true, there is no evidence that the defendant separated himself from the petitioner *before the summer of* 1845. It will, therefore, be proper

for the jury to confine their attention to what took place *after* August, 1845, in order to decide whether the defendant had separated himself from the petitioner against her consent."

We are to take the issues and the finding to be in these words: "The defendant *after August*, 1845, did separate himself from the petitioner and live in adultery," etc. Consequently, there is a variance between the "*probata*" and the "*allegata*," for the petitioner alleges that the defendant separated himself from her in 1844. So the decree for a divorce is put simply on the proof and not on the ground that the *allegations* were proven. In this there is error. An allegation without proof passes for nothing; proof without an allegation passes for nothing. This is the rule in reference to all proceedings in court, for without a distinct allegation the defendant is left in the dark, and cannot be expected to come prepared with his proofs. But in a divorce case the statute requires not only that the allegations should be made, but should be *sworn to*. It may be proper to notice the fact that the petition was amended, and was not sworn to as amended. We do not put our decision on that, but we think clearly that all the allegations introduced by the amendment are for that reason out of the case. It is said that the allegation is proven, except in regard to the time, and that
(96) time is immaterial—"it is not the essence of a contract or of an offense." This is, in general, true; but "time" is sometimes material; and when so, it is just as important to prove the allegation in reference to it as anything else; and the question is, "Was it material to fix *the time* of the separation?"

If a wife leave a husband and refuses to live with him, *without sufficient cause*, and he afterwards lives in adultery, this is no cause of divorce, for the consequence may be ascribed to her prior violation of the duty of a wife. "No one shall be allowed to take advantage of his own wrong."

If a husband is accused of a crime, or if he is guilty of it, this is no sufficient cause for his wife to refuse to live with him, and she is not thereby justified in a violation of her marriage vow. She agreed to take him "for better or for worse."

The petitioner alleges that the defendant *abandoned her* (that is the most expressive word) in 1844. This allegation is denied, and the defendant says he and the petitioner "lived upon the best and most conjugal terms" until after August, 1845, when she was "forced by her mother and other persons unfriendly to him to abandon him and to refuse to live with him." The pleadings, therefore, make this distinct issue: Was the fact that the parties ceased to live together as man and wife caused by the act of the petitioner, to which, it is alleged, she was persuaded or forced by others, or was it caused by the act of the de-

fendant, he being unwilling to live with her, and rejecting her as his wife? In reference to this issue, time *is material*, for the very question is, Which of the two was the first, in point of time, who came to the determination not to recognize the other, in violation of the duties imposed by the marriage vow?

Upon the next trial we hope the issues will be more precise in (97) terms, and in reference to the points put at issue by the pleadings.

PER CURIAM. *Venire de novo.*

Cited: Earp v. Earp, 54 N. C., 243; *McQueen v. McQueen,* 82 N. C., 473; *Ladd v. Ladd,* 121 N. C., 120; *Holloman v. Holloman,* 127 N. C., 16; *Setzer v. Setzer,* 128 N. C., 172; *House v. House,* 131 N. C., 142; *Page v. Page,* 161 N. C., 175; *Sanderson v. Sanderson,* 178 N. C., 341.

JAMES TAYLOR v. JOHN W. STEDMAN.

In an action of assumpsit brought for a certain sum of money agreed to be paid, it is no bar to the plea of the statute of limitations that the defendant, within three years promised to pay the debt in good notes or judgments, which promise was accepted by the plaintiff.

APPEAL from *Ellis, J.,* at Fall Term, 1851, of CHATHAM.

The facts of the case are stated in the opinion of the Court.

Haughton for plaintiff.
W. H. Haywood for defendant.

PEARSON, J. This is assumpsit for the sum agreed to be paid as the hire of a slave in 1842. The writ was issued in 1848. The defendant relied on the statute of limitations. There was a special replication of a promise to pay within three years, upon which issue was joined. To prove the new promise, plaintiff gave evidence of a conversa- (98) tion between himself and defendant in 1847, in which plaintiff demanded payment of the hire of the slave; defendant replied he was not then ready to do so; plaintiff thereupon requested him to give his note; defendant asked, "Will not other notes or judgments do?" Plaintiff replied, "Yes, if they are good." Defendant said, "They shall be good, or, if they are not, I will make them good."

The court instructed the jury to find for the defendant, being of opinion that this evidence did not remove the bar of the statute. Counsel

of plaintiff then requested the court to instruct the jury that if in their opinion the defendant had acknowledged that the debt was still subsisting, or that he meant, by the language used, to promise to pay it, in either event plaintiff was entitled to a verdict, the counsel insisting that the meaning of the defendant under the circumstances was a question of fact to be ascertained by the jury. This was refused, and for this the plaintiff excepted. A verdict was rendered for the defendant upon the plea of the statute of limitations, and from the judgment thereon the plaintiff appealed.

When this case was before us in 1850, 33 N. C., 447, there was no evidence from which it could be inferred that the *proposal* to pay in notes was accepted, and it was held to be within the principle of *Wolf v. Fleming*, 23 N. C., 290. As the case now comes up, the plaintiff has a right to insist that it should be taken that the proposal was accepted, and that it was agreed that the debt should be paid in good notes. The point is this: Does a promise to pay in good notes sustain the replication of a new promise *to pay* within three years? In other words, is a promise to pay in *good notes* the same in its legal effect as a
(99) promise to pay in *money?* The difference is so obvious as almost to make it unnecessary to point it out. A. owes B. $100. The action is barred by the statute of limitations. A. says, "I will give you a horse that is worth $100 in satisfaction of the debt." B. agrees to the proposition; but A. afterwards refuses to deliver the horse, and thereupon B. brings suit—not on the special promise, but for the original debt, and, in reply to the statute of limitations, alleges a new promise to pay, and for proof relies on the promise to deliver a horse. Counsel for plaintiff admits that a promise to pay means a promise to pay the money—specie. But he suggests that a promise to pay the notes of individuals is the same as a promise to pay in bank bills, and asks: Suppose the defendant had promised to pay in notes of the "Bank of the State," would not that support the allegation of a new promise? The fallacy of the argument is in this: Bank bills are so generally received as money that they not only represent money, but, in common parlance, are taken to mean money. In our case it was evidently not the intention of the defendant to assume to pay the debt *in money* or in bank bills, because he assumes *specially* to pay it in notes or judgments on third persons, whom he will guarantee to be good. This cannot in any way be construed to be a promise to pay in money.

The other ground of exception, because the meaning of the words ought to have been left to the jury, was properly abandoned.

PER CURIAM. Affirmed.

Cited: McCurry v. McKesson, 49 N. C., 512.

(100)

WILLIAM A. TARKINTON v. DAVID C. GUYTHER.

Where A., a defendant in an execution, places funds in the hands of the sheriff for the satisfaction of the execution, and the sheriff enters on it "satisfied," but before he makes his return another arrangement is made between the sheriff and A., and the funds are withdrawn and applied by A. to another purpose, upon which the sheriff strikes out the entry of satisfaction: *Held*, that when sued upon the judgment on which this execution issued, A. could not avail himself of this arrangement with the sheriff in support of a plea of payment, but that the plaintiff, though he might proceed against the sheriff, yet had not lost his remedy upon the judgment.

APPEAL from *Settle, J.*, at Fall Term, 1851, of WASHINGTON.

This is an action on a judgment rendered in Washington County Court in November, 1841, against the defendant and one Fagan for $137.81, and the pleas are payment and satisfaction. The evidence was that in September or October, 1842, one Davis, then sheriff of the county, applied to Fagan for a loan of $500, and that Fagan replied that he had no money of his own, but handed him that sum and took his receipt and note therefor, telling Davis at the same time that he wished it applied to executions against him. Afterwards the sheriff received executions against Fagan, and amongst them was a *fieri facias* on the judgment of Tarkinton against Fagan and Guyther; and he also received others against Guyther alone, and on 16 November following, a deputy sheriff applied to Fagan for payment of those to which he was a party, and Fagan delivered to him the note or receipt of Davis and requested him thereout to satisfy the execution of Tarkinton, and the deputy agreed to do so, and entered satisfaction thereon. Afterwards the deputy applied also to Guyther for payment of the execu- (101) tions against him, but he was unable to raise the money, and an arrangement was then made between Fagan, Guyther, and the deputy sheriff that the said sum of $150 should be then applied to the execution against Guyther alone instead of Tarkinton against him and Fagan, and that when Tarkinton should want his money raised Guyther should pay the whole of it; and in conformity thereto the deputy sheriff, by the directions of Guyther, struck out the entry of "satisfaction" on the plaintiff's execution against Fagan and Guyther and applied the same amount to the discharge of the executions against Guyther alone. The court instructed the jury that the evidence did not support the issues on the part of the defendant, and the plaintiff had a verdict and judgment, from which defendant appealed.

Heath for plaintiff.
Smith for defendant.

RUFFIN, C. J. The judgment must be affirmed. It is admitted that directions at the time of payment, to apply it in satisfaction of a particular execution, would, while things remained in that state, be *prima facie* a discharge of the execution, and make it wrongful in the sheriff to proceed further on it. And it need not be denied that if an execution be against two, and one of them pay money on it, he and the sheriff cannot afterwards, though before the return, change the application to the prejudice of the other defendant. For, however that may be, it cannot affect this controversy, because both of the debtors—the present defendant and Fagan—gave directions to the sheriff to apply the money to an execution against this defendant alone, and, consequently, not to return plaintiff's execution satisfied. It is the same, then, as if
(102) the execution had been against a single person, who, after paying the sheriff a sum of money with an intention to discharge it, received the same back or had it applied to another demand against him in the hands of the sheriff. The creditor, indeed, might insist that the sheriff should hold the money, once in his hands, for him, and he might look to the sheriff for it. But as between the debtor and creditor, the latter is not bound to do so, for as the debtor got his money back or had the use of it in another manner before it was conclusively applied, by being actually paid to the creditor or by the sheriff's return of the *fieri facias,* the creditor ought to have his election to raise it from the debtor. The case is much the same as if a sheriff seize goods to the value of the debt, and the debtor got them before a sale; and that is certainly not a satisfaction. The officer's memorandum on the writ of the levy or of satisfaction can make no difference in either case, because it is not a return until he makes it to the court, and in the meanwhile it is in his power, and, indeed, it is his duty, to alter it as the truth may require. It would be a reproach to the law if judgments and executions could be thwarted by a trick like this, which is too much against morals not to be also against law.

PER CURIAM. Affirmed.

(103)

JAMES H. SHEPARD AND WIFE ET AL. v. JOSEPH R. PARKER, ADMINISTRATOR, ETC.

1. In a suit by legatees or distributees against an executor or administrator, this Court has the power to review the decision of the courts below in the allowance of commissions.

2. This power may be exercised not only where the allowance has been made upon a wrong principle, as in the case of a retainer or a delivery

over of slaves being considered a disbursement, but also when the commissions allowed below are *clearly* either inadequate or excessive.

3. Where the exercise of discretion is in reference to a matter arising collaterally and which does not present itself as a question in the cause, the decision in the court below is conclusive, as in the case of amendments, etc. But when the discretion is exercised in reference to a *question in the cause*, the appeal, bringing up the whole case, necessarily brings that up.

4. The allowance of commissions to executors and administrators is in every case a *question in the cause*.

5. Commissions may be allowed on a note due to the testator or intestate, delivered over as a payment in cash by the executor or administrator to a legatee or distributee.

APPEAL from *Settle, J.*, at Fall Term, 1851, of WASHINGTON.

The case is stated in the opinion delivered in this Court.

Ehringhaus and Heath for plaintiff.
Smith for defendant.

PEARSON, J. This was a petition filed in the county court for an account of the estate of one Morris, and for the payment of a filial portion. An exception was made by the plaintiffs to the amount stated by the commissioner, because the commissions were improper and excessive. The exception was not allowed by the county court, and upon appeal to the Superior Court it was again not allowed, and thereupon there was an appeal to this Court.

We do not accede to the position taken by counsel for de- (104) fendant, that this Court has no power to revise the decision of the courts below on the question of commissions. Where there is a mistake in the law, or where commissions are allowed contrary to law, as if commissions be allowed upon a *retainer* of the administrator as a *disbursement*, or upon the value of slaves who are not sold, but are delivered to the distributees, it is conceded that this Court has power to correct the error, and this distinction is contended for. This Court has jurisdiction when commissions are allowed upon a wrong principle, but not where it is suggested that the commissions are excessive; for the *amount* of commissions is a *matter of discretion*, restrained by statute to 5 per cent, and this Court has no right to review the exercise of this discretion. We admit the distinction, but do not concede to it the effect contended for, except to this extent: when the objection is put on the ground of inadequacy or of excess, this Court is not disposed to interpose, unless the amount is clearly inadequate or clearly excessive, for the reason that it most usually happens a more minute investigation

of the entire subject of the account takes place in the court below than it becomes necessary to give to it in this Court, and it is therefore proper to presume that the rate adopted in the court below is correct.

But it is asked, Upon what principle can this Court review a matter of discretion which has been acted on in the court below? The distinction is this: When the exercise of discretion is in reference to a matter arising collaterally, and which does not present itself as a question in the cause, the decision of the court below is conclusive, as in cases of amendment; but when the discretion is used in reference to a *question in the cause*, the decision is subject to review. For although in one sense it is a matter of discretion, still, being a question in the cause, the appeal which brings up the whole case necessarily brings it up.

(105) The act in reference to the recovery of "legacies, filial portions, and distributive shares" confers on the county court equity jurisdiction to a limited extent, under which those courts enter into all matters connected with taking accounts and settling estates, among which the allowance to executors and administrators is a question presented in every case, and is just as much a *question in the cause* as allowing or rejecting a voucher; consequently, an appeal carries up the question of commissions to the Superior Court, and to a limited extent incidentally confers equity jurisdiction upon the law side of that court. An appeal to this Court has a like effect. In *Walton v. Avery*, 22 N. C., 411, this question is discussed, and it is held: "The subject of commissions, as incidental to the settlement of administrators, is within the cognizance of every court exercising equitable jurisdiction in a suit for the purpose of settling those accounts." It was insisted by plaintiff's counsel that as to one item the allowance was *wrong in principle*, and of course ought to be corrected. The intestate held on one White a note for $12,000. This note the administrator passed over, as cash, to the guardian of some of the distributees; the amount is included under the head of "receipts," upon which commissions are allowed. It is argued, this note, being passed over without the trouble of collection, is like the case of a slave delivered to a distributee whose value is not to be included under the head of "receipts." The argument merited consideration, but we have come to the conclusion that the cases are not the same. In reference to a slave, the administrator has no responsibility; whereas, by not requiring payment of the note, he becomes chargeable for the amount. There is the further consideration:

(106) a note passed over in this way is kept at interest all the time. This is for the benefit of the estate, and if the administrator chooses to take the risk, we can see no reason for requiring him to collect any note. It is said, again, in reference to this note, the rate of commissions is *clearly excessive*. If this was an isolated question, we

should have no hesitation in saying that the allowance was excessive. But when we see this was a large estate, involved in a good deal of litigation, although taking it all together we think the commissions are high, yet we do not consider them so exorbitant as to call for interference on our part, in the face of the decision of the county court, which was concurred in by the Superior Court.

PER CURIAM. Affirmed.

Cited: Whitford v. Foy, 65 N. C., 277; *Green v. Barbee,* 84 N. C., 72; *Scroggs v. Stevenson,* 100 N. C., 359; *Bank v. Bank,* 126 N. C., 537.

THOMAS RICHARDSON v. JOEL STRONG.

1. Contracts with lunatics are not all absolutely void; but such as are fairly made with them, for necessaries or things suitable to their condition and habits of life, will be sustained.

2. Where a person is insane, so as to attempt injury to himself and the destruction of his property, the services of a nurse and guard fall within the class of necessaries as defined by law.

APPEAL from *Ellis, J.,* at Fall Term, 1851, of GRANVILLE. (107)

Assumpsit for work and labor, tried on the general issue. The case was that the defendant became insane, and so much so as to attempt injury to himself and the destruction of his property. He had negro servants, but his physician and relations thought it necessary that there should be some white person with him, as a nurse and a guard against his violence; and a son-in-law of the defendant requested the plaintiff to attend on him. He did so, and upon defendant's recovery he refused to pay him anything, and this action was brought. Defendant objected that as he was a lunatic at the time, no promise could be implied, and also that plaintiff's services were unnecessary. But the court instructed the jury that if they believed the evidence as to the condition of the defendant, and the state of his family, the services of the plaintiff were necessary to the defendant; and if so, the plaintiff was entitled to recover. Verdict and judgment for plaintiff, and defendant appealed.

Saunders for plaintiff.

J. H. Bryan and Busbee for defendant.

RUFFIN, C. J. The contracts of a lunatic are not all absolutely void; but it is held that contracts fairly made with them for necessaries or things suitable to their condition or habits of life are to be sustained. The leading case on the subject in England is that of *Baxter v. Earl of Portsmouth*; and in *Tally v. Tally*, 22 N. C., 385, the same opinion was expressed by this Court. There is, therefore, no absurdity in the case of lunatics more than in that of infants in implying a request to one rendering necessary services or supplying necessary articles, and implying also a promise to pay for them. Indeed, with whatever (108) propriety the ancient maxim that no one ought to be allowed to stultify himself is denied in modern law, its application in a case of this kind seems to be entirely just. The urgency of the case demands instant help, and leaves no opportunity for a previous application to a court having the ordering of the estates to fix an allowance; and in such an instance as this, in which, as far as is seen, there was a recovery before a commission issued, there could be no subsequent allowance, however assiduous and effective the attentions to the party might have been. Therefore, there is no middle ground between leaving an unhappy person thus afflicted destitute of those services and things indispensable to his proper restraint and recovery, or however rich, dependent for them on gratuitous benevolence, on the one hand, or, on the other, of implying a promise to pay for them what they may reasonably be worth. It is as if a physician administered to a man deprived of his senses by a dangerous blow, when the loss of life might result from delay. He would certainly be bound to make reasonable remuneration, though incapable at the moment of making an actual request. The reason extends to medical services to a madman, and to those of a nurse for him, or of a guard to protect him from a propensity to destroy himself or his property. In the case before the Court the plaintiff acted at the instance of defendant's medical adviser and his nearest friend and relative, not insisting, however disagreeable the duty, on any stipulation for high wages, but content with a *quantum meruit*. His conduct was, therefore, as fair as it could be.

Upon the other point there is no doubt. What the plaintiff did certainly falls within the class of necessaries as defined in the law.

PER CURIAM. Affirmed.

Cited: Hyman v. Cain, 48 N. C., 112; *Freeman v. Bridges*, 49 N. C., 4; *Pool v. Everton*, 50 N. C., 243; *Surles v. Pipkin*, 69 N. C., 521.

(109)

DANIEL L. BURGESS v. CHARLES CLARK.

1. In condemning an acre of land for the purpose of erecting a mill, the Court is forbidden to confirm the report of the commissioners if it take away "houses, etc."—and, by necessary implication, the commissioners are forbidden to include them in their survey.

2. The commissioners, therefore, are not authorized to include in their valuation any houses found on the condemned acre, even though erected there by the petitioner before the proceedings were commenced. The valuation must be confined to the naked land.

APPEAL from *Dick, J.*, at Fall Term, 1851, of HYDE.

The case is stated in the opinion delivered in this Court.

Donnell for plaintiff.
No counsel for defendant.

NASH, J. Plaintiff filed his petition in the County Court of HYDE to condemn an acre of defendant's land for the purpose of erecting a public mill. Copies of the petition were issued to defendant, and four freeholders were appointed by the court to lay off and value the acre. The commissioners made their report at a subsequent term of the court. In their report they designate the beginning of the acre as follows: "Beginning in the center of the said Burgess's milldam, immediately at the east side of Rutman's Creek." All the other metes and bounds are set forth; they value the acre at $10. This return is made under their hands and seals and is dated in 1851. Defendant objected to the confirmation of the report, *first*, "because of the want of definite- (110) ness in the description of the land set apart; because the value stated of the land is not, in fact, such as it should be; and, *third*, because the report does not state at what particular time it was made." The objections were overruled by the county court, and an appeal taken to the Superior Court, where the judgment was affirmed, and an appeal taken to this Court. The case states "that shortly after the petition was filed, and before the freeholders laid off the acre mentioned in their report, the petitioner partially erected a mill-house on the acre of land, and had his mill running at the time they laid off the acre, and in making the estimate of the value of the acre they did not take into the estimate the value of the fixtures."

The judgment of the court below must be affirmed. The first and third objections of the defendant were in a measure abandoned, and the whole defense put upon the second. This is also untenable. The proceedings are had under the act of 1836, Rev. Stat., ch. 74, sec. 2.

The object of the act was to vest in the person making the application to erect a public mill on a stream where he owned the land but on one side, the fee simple in an acre of land opposite to his mill site. This *acre of land* the freeholders are directed to value, and under the act it was all they could value. The court is forbidden to confirm the report if it take away "houses, orchards, gardens, or other immediate conveniences," and by necessary implication the freeholders are forbidden to include them in their survey. The improvements thus forbidden to be included in the acre to be condemned were improvements put on the land by the owner, or on it before the proceedings were commenced. The Legislature would not allow the proprietor to be deprived of them for the purpose of even erecting a public mill, beneficial as it is deemed to the community. The right of eminent domain was sufficiently
(111) exerted in depriving a man of his land *in invito*. Had the defendant, then, or those who preceded him in the possession and ownership of the land, put these improvements on it, the acre sought to be condemned could not have been laid off there, or, if so, it must have been so done as not to include them. It is evident, then, that it was the intention of the Legislature that a petitioner in such case should pay only the value of the naked land, and the freeholders had no authority to include in their estimate the value of the improvements. It is true that at the time they were erected by the plaintiff the land belonged to the defendant, but they were put there for no illegal purpose. The petition had been filed and the freeholders appointed, and the plaintiff had a right to believe that the land on which they stood would be condemned for his use. It has been so condemned, and by the law the fee simple is vested in him, or will be. It would, therefore, not be just to compel him to pay for his own work and labor. The defendant has got what the law intended he should get and he must be therewith content.

PER CURIAM. Affirmed.

Overruled: Minor v. Harris, 61 N. C., 323.

(112)

ROBERT WILLIAMS v. JOSHUA BEASLEY.

1. An appeal lies to the Superior Court from an order of the county court allowing an amendment or setting aside a judgment for irregularity.

2. There cannot properly be a final judgment by default upon an appeal from a justice of the peace; but the matter must be determined upon proofs either by the court or by a jury.

3. Judgments taken as of course are from necessity always under the control of the courts whose judgments they purport to be, and of an appellate court, which can treat the matter *de novo*.

APPEAL from *Settle J.*, at Fall Term, 1851, of CURRITUCK.

This suit was begun by a warrant for "$12 forfeited by the defendant by not working on a public road leading," etc., "for twelve days, though lawfully summoned by the plaintiff, the overseer of said road." The magistrate gave judgment against defendant for $1 and costs, and plaintiff appealed; and at the next term of the county court, in February, 1851, the appeal was returned, and for want of defendant's appearance, the plaintiff's attorney took a judgment by default final for $12 and costs. At May term following, the county court, for cause shown by defendant, ordered that the judgment by default should be set aside and defendant allowed to plead; and plaintiff appealed from the order. His Honor was of opinion that the judgment by default in the county court ought not to have been final, and that it was irregular thus to enter it in the office; and, therefore, it was proper to set it aside. But his Honor was further of opinion that an appeal did not (113) lie from the order of the county court, and for that reason he dismissed the appeals and then awarded a *procedendo*, and plaintiff appealed to this Court.

Smith for plaintiff.
No counsel for defendant.

RUFFIN, C. J. It was a mistake to suppose that an appeal does not lie to the Superior Court from an order of the county court allowing an amendment or setting aside a judgment for irregularity, as the contrary has been often decided. *Slade v. Burton*, 32 N. C., 390. But the Court concurs in the opinion on the other point, and that is decisive of the case against the plaintiff. As warrants do not, like declarations in debt, define particularly the bond or other specialty on which they demand a debt, it follows that they must be regarded in the light of declarations in assumpsit, or other actions sounding in damages. *Duffy v. Averitt*, 27 N. C., 455; *Emmitt v. McMillan, ante*, 7. Besides the reasons given in those cases for the rule, it may be mentioned that it is further supported by the consideration that the statute requires that the suit shall be by warrant for all sums of $60 or under "for a balance due on any special contract or note"; since it cannot be supposed to be required of the plaintiff to state the exact balance, throwing on him the risk of allowing the payments precisely, and making the calculation of interest with perfect correctness. There cannot, therefore, properly be

a final judgment by default upon appeal from a justice of the peace; but the matter must be determined upon proofs, either by the court or by a jury, as mentioned in *Ransom v. Harshaw*, 30 N. C., 480. That was not the course in this case, but the judgment was entered (114) without the intervention of the court in the office, as of course, and, therefore, was erroneous and irregular. Such judgments are, of necessity, always under the control of the court whose judgments they purport to be, and of an appellate court, which can treat the matter *de novo*. *Bender v. Askew*, 14 N. C., 150; *Keaton v. Banks*, 32 N. C., 381.

PER CURIAM. Affirmed.

Cited: Murphrey v. Wood, 47 N. C., 65; *Powell v. Jopling, ibid.*, 403; *Underwood v. McLaurin*, 49 N. C., 18; *Griffin v. Hinson*, 51 N. C., 156; *Parker v. Express Co.*, 132 N. C., 130.

Dist.: White v. Snow, 71 N. C., 234.

STATE v. JOAB B. CHEEK.

1. A witness may refresh his memory by looking at a book of entries kept by himself, without producing the book on the trial.

2. To receive in evidence, under our statute, a certified copy from the Secretary of State of an act of Assembly of another State, it is sufficient that the seal of the State be attached to the certificate, required from the Governor. It is not necessary that it should be attached to the Secretary's certificate.

3. A transcript of a statute, once duly certified by the Secretary of State in the manner prescribed by our law is evidence at all times of its being in force according to its terms unless a repeal be shown.

4. Evidence is admissible as to the genuineness of a bank note, of the opinion not only of cashiers and tellers of banks, but also of merchants, brokers, and others who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them and able to judge between a true and a counterfeit bill, and have that knowledge, among other things, tested by the fact that no bill passed by the witness has been returned, though there has been ample time for it, if any of them were not genuine.

5. There can be no accessories in inferior offenses; but whatsoever will make a man an accessory before the fact in felony will make him a principal

in trespass and other misdemeanors, as in battery and forgery at common law. Procurers and aiders, therefore, in such cases are principals, and may be so charged in an indictment.

APPEAL from *Ellis, J.*, at Fall Term, 1851, of CHATHAM. (115)

The prisoner was indicted with Aaron Malone and Robert George, a free negro, for passing to one Berry Davidson a counterfeit note, purporting to be a note for $20, issued by the Bank of Georgetown, in South Carolina. One count charged, in the usual form under the statute, that all three of them passed the note; and a second, that Malone passed it, and that George and Cheek incited and procured him to pass it. They were tried together and found guilty generally, and Malone and George submitted to the sentence pronounced, but Cheek appealed to this Court. The bill of exceptions states the case to the effect following:

One Seymore was produced as a witness on the part of the State, and swore that he kept a shop in which he retailed spirits on a high road in Chatham leading to Fayetteville, and that in the evening of a day in March, 1850, the prosecutor, Davidson, with one Stout, stopped for the night, with their wagons, on the road about 250 yards from his house; that the same evening the three prisoners came in company to his house, and said they had been working in the employment of one McCullock, a contractor engaged in the improvement of Deep River under the Navigation Company, and they asked for some liquor and to stay all night; that the witness got the liquor for them, when one of the company said they had no small change, and George, after holding a conversation with the other two in a low tone at the door, came to the witness and offered him a $20 bill of the Bank of Georgetown, which he refused to take, telling George that he was (116) not a judge of South Carolina bank notes, but he did not think that was good; and that thereupon George went back to the other prisoners and soon returned to him with a piece of silver change, with which he paid for the liquor, and the three drank it between them; that they soon got some more spirits, for which they gave him a knife; and that they retired soon afterwards to the room in which they were to sleep; that the prisoner Cheek was then drunk, and soon fell asleep on the bed, and Malone and George left the house together; and after some absence they returned and awoke Cheek and held a conversation with him in a whisper, and then Cheek got up and went away with George, and they did not return. This witness further stated that Malone and George claimed the note, and that he did not know that Cheek saw it.

Davidson deposed that after he and Stout had encamped, as before mentioned, the prisoner George came to the camp and said he was free, and named John George, and he soon proposed to buy a watch, which he saw the witness wearing, and that he refused to trade with the prisoner because he was a negro; that George then said he would go and get his young boss to make a trade, and he went away, but in a short time returned with the prisoner Malone, who said his name was James Johnson, and proposed to buy the watch; that they bargained for the watch at $13, and Malone offered in payment the note of the Bank of Georgetown for $20, set forth in the indictment, saying that he and George were both interested in it; and upon being asked whether it was good, he said it was, and that they had received it from McCulloch, the contractor on Deep River, where they had been at work; and thereupon the witness delivered the watch and received the note;

(117) that the witness paid Malone one dollar, but could not make change for the other six, and it was agreed that he should leave that sum next day with a man in Haywood, and Malone and George then went away; that in about half an hour the prisoner Cheek (who, like the other two, was unknown to the witness) came to the camp with George, and had the watch with him, and said his name was Brooks, and that he had advanced the money to Malone for the $6, which the witness owed him, and that, as the witness was a stranger, he would take $5, if he would pay it at that time; and the witness borrowed $6 from Stout and paid that sum to Cheek, who then went away with George; that Cheek did not see the $20 note in his possession, nor did he claim an interest in it.

One Harris deposed that about an hour before daybreak the next morning Cheek and George came to his house, which was in the same neighborhood, and stated that they were on their way from the Deep River works and had lost their road; that Cheek was then drunk and said his name was Brooks, and that he was the son of one Thomas Brooks.

One McCulloch deposed that he was a superintendent for the contractors at Buckhorn Falls, on Deep River, and paid all the money expended there; that the prisoners worked under him in February or March, 1850, and that he paid to each of the white men $3, and to the negro $1; and that he did not let either of them have a $20 note. The witness was then asked if he kept an account of his expenditures, and had refreshed his memory by referring to his books; and he replied that he kept books, and had refreshed his memory by referring to them. Thereupon counsel for the prisoners objected to the competency of his testimony; but the court received it.

On the part of the State there was then offered a copy of the (118) statute of South Carolina incorporating the Bank of Georgetown, certified to be a copy by William Hill, Esq., the Secretary of State, with a certificate by William A. Graham, Esq., as Governor of this State, that William Hill, who gave the certificate, was at that time Secretary of State. Counsel for the prisoners objected to it because the seal of the State was not attached to the certificate of the Secretary, but to that of the Governor, and because the certificate of the Secretary was dated 4 January, 1848, and that of the Governor the 3d day of that month, and also because the certificate of the Governor in 1848 was insufficient, and that it should have been that of the Governor at the time of the trial. But the court admitted the evidence.

Mr. Dewey was then offered on the part of the State, and he deposed that he was a clerk in the Bank of the State at Raleigh and had been for four years; that his duty was to assist in keeping the books, but that when large sums were received or sent away he assisted the teller in counting, and had frequently handled bills of the Bank of Georgetown in South Carolina, and had received and sent them off, and had never had one returned as counterfeit nor seen one that was counterfeit; and that he thought he was a perfect judge of good and counterfeit money. The witness was then asked whether he thought the bill then shown to him being that described in the indictment—was good or bad; and counsel for the prisoner objected to his answering the question. But the court allowed him to answer; and he stated that it was counterfeit, and that the names of the president and cashier were not written by them, but were printed from an engraving, and that in other respects mentioned by him it was different from a genuine note.

Counsel for the prisoner Cheek prayed the court to instruct (119) the jury that he could not be convicted on the second count, because the offense of the principal was a misdemeanor and did not admit of accessories, and that there was no evidence tending to show him to be guilty on the first count as principal in the second degree. The court refused to give the instruction prayed, and informed the jury that if they believed the prisoner Cheek aided and assisted the other two prisoners in passing the counterfeit bill to Davidson by participating in their plans and counseling and advising them to that end, or assured them, before the passing of the bill, that he would be at hand to extricate them from detection or difficulty, then he would be guilty as principal, though not actually present when the note was passed.

Attorney-General for the State.
Haughton and G. W. Haywood for defendant.

RUFFIN, C. J. It is objected that McCulloch ought not to have been allowed to speak of anything on which his memory had been refreshed by looking at his books, without producing the book on the trial. But the rule seems to be otherwise. As the book was written by the witness himself, and was not in itself evidence, and the witness was obliged, after seeing it, to speak from his remembrance of the facts, it could serve no purpose to compel him to bring his book to court. At most, the absence of it could only affect the confidence the jury might yield to his statement, as it might not be as great as if the refreshing of his memory accompanied the giving of his testimony. It could not take away his competency nor render it improper for him to state to the jury that he had refreshed his memory by referring to his original entries, though not then present. *Kensington v. Inglis*, 8 East, 273. Indeed, it
(120) is obvious that, as to the essential point of his testimony, that he did not pass a $20 note to either of the prisoners, he was deposing from his unassisted memory, since that is a particular fact on which no information could be expected from the book.

The transcript of the law of South Carolina was properly received. *S. v. Jackson*, 13 N. C., 563, is in point against the objection respecting the seal of the State. A transcript once duly certified is evidence at all times of the existence of the statute and its being in force according to its terms, unless a repeal be shown. The difference in the dates of the Governor's and Secretary's certificates is evidently a mere mistake, and cannot affect the competency of the document, because it follows necessarily from the Governor's certificate that, at the time he gave it, Mr. Hill had given his. The wrong dating of the one or the other is therefore not material.

Then as to Mr. Dewey's evidence, the rule is not restricted to cashiers and tellers of banks, but it admits merchants, brokers, and others who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them and able to judge between a true and counterfeit bill, and have that knowledge tested, among other means, by the fact that no bill passed by the witness has been returned, though there has been ample time for it, if any of them were not genuine. *S. v. Candler*, 10 N. C., 393, and *S. v. Harris*, 27 N. C., 287, establish that as the general rule; and the present case is so plain that there could be no mistake, since the signatures to the note, purporting to be those of the president and cashier, were not written, but printed.

(121) It was lastly contended on the merits that the prisoner Cheek ought not to have been convicted, because he was in fact drunk and asleep, at the distance of 250 yards, when the other two passed the

note, and there was no evidence of his preconcert with them to pass it; and hence that he was not guilty as principal, and could not, in law, be guilty as accessory before the fact. It is true, there are no accessories in inferior offenses. But it does not follow that procurers and aiders in such cases are not guilty at all. On the contrary, because they are not accessories, the law holds them to be principals. Some observations fell from *Henderson, J., arguendo*, in *S. v. Good*, 8 N. C., 463, which seem the other way. He may have been led hastily to express himself inaccurately, by not distinguishing between the case of accessories before the fact and the one then before the Court, which was whether there could be an accessory after the fact by receiving stolen goods of less value than twelve pence. This is more probable because, a few years afterwards, in *S. v. Barden*, 12 N. C., 518, that eminent judge laid down the law explicitly to the contrary, when it was directly to the point before the Court; and in so doing he was unquestionably right, according to the text writers and adjudged cases. For example, in *Rex v. Jackson* one hired some men to beat another, and they did it in his absence, and then he was indicted for the battery, as having been committed by himself, and convicted and heavily punished; and Hawkins, book 2, ch. 29, sec. 2, lays it down that whatever will make a man an accessory before the fact in felony will make him a principal in trespass and other misdemeanors, as in battery, forgery at common law, and others. Whence, he says, it follows that, being in judgment of law a principal offender, he may be tried and found guilty before any trial of the person who actually did the fact. Mr. East lays down the same doctrine as to forgery at common law, because it was but a misdemeanor. 2 East, pages 6, 973. In effect, then, both of the counts in this indictment (122) charge the prisoner as a principal, for the one charges directly that all three passed the note, and the other that one of them passed it and the other two procured him to pass it. The question then is, whether there was evidence to be left to the jury that the note was passed by Malone or George at the instigation of Cheek or by preconcert with him. His Honor thought there was, and this Court is of the same opinion. The three persons formed one party, and appeared to be acting on secret consultations with each other, and all the little they had seemed to be in common. There was much falsehood among them, in representing that the note came from a responsible person and in acting under false names. Those circumstances and others render it probable that all of them intended beforehand to pass the counterfeit note on joint account to the first person who would take it, and that if they could not get it off on Seymore, they would try it on the wagoners encamped near at hand, and that it was in fact passed in execution of that plan. For why should

all three of them have been whispering together just before the note was offered to Seymore? And why did Malone and George leave Seymore's house after having once retired for the night, unless for the purpose of imposing on the men with the wagon? Now, they had no opportunity of knowing that those men were encamped at the road which Cheek did not also have; and then their secret communication to him on their return, and his quick apprehension of what they had done, evinced by his readiness to enter at once in a feigned name on the completion of that part of the business which they had left unfinished, and, after having done so, his departure with George in a different direction under still another name, are circumstances from which an inference may be deduced that in reality there was a conspiracy between the three to pass the
(123) note to Seymore or Davidson, and that each of them played his part in execution of it and on joint account. Those subsequent acts of Cheek do not of themselves constitute the offense; but in connection with the falsehoods uttered by them all, and the other previous parts of the transaction, they reflect back on the actions and motives of the three from the beginning, and were fit to be considered by the jury, and indeed raise as strong a presumption against this prisoner as may be expected in cases of the kind. The Court is, therefore, of opinion that there is

PER CURIAM. No error.

Cited: Yates v. Yates, 76 N. C., 149; *Murphy v. Harper*, 84 N. C., 195; *Davenport v. McKee*, 94 N. C., 330.

DEN ON DEMISE OF JUDITH LONG v. SAMUEL ORRELL ET AL.

1. The last proviso to the first section of the act of limitations, Rev. Stat., sec. 1, extends to cases where the plaintiff has been nonsuited, as well as to those in which a verdict has been found against him.

2. Where there are several demises of divers persons in the declaration in the first action of ejectment, it is not necessary that a demise from each of those persons should be laid in the declaration in the second action, but it is sufficient for the second declaration to be on the single demise from that one or more of the lessors in the former suit in whom the title is found to have been; for the count on each of the several demises is in law the same as a separate action, and, therefore, the title of each person is saved who was a several lessor in such action.

3. By brining an ejectment, a party then having the right of entry shall continue to have it as long as that action pends and afterwards, also, if within one year afterwards he will bring another action, and so on from time to time—no matter who may be at any time the tenant in possession.

APPEAL from *Manly, J.*, at Fall Term, 1851, of DAVIE. (124)

This suit was commenced 31 August, 1849, and the declaration was on the several demises of Judith Long, and all her brothers and sisters, except Alexander Oaks. On the trial the plaintiff gave evidence that the premises were parcel of a larger tract, of which Thomas Oaks was in possession in his lifetime, and at his death, claiming it as his own; and that after his death the said Judith and Alexander and six others, being the children of said Thomas, continued in possession, claiming under their father. Plaintiff further offered in evidence a deed of bargain and sale in fee, dated 3 July, 1831, for the whole tract, from Joseph Hanes and Michael Hanes to the said eight children of Thomas Oaks, describing them as his heirs, and describing the land as situate, lying and being in the county of Rowan, on the Yadkin River, and bounded by the lands of Nathaniel Markland, Michael Hanes, and J. Ellis, containing 558 acres, more or less, and being the land formerly owned by Samuel Jones. The certificate on the deed on which it was registered is as follows: "Rowan County: August Sessions, 1831. I hereby certify that the within deed was duly acknowledged in open court and ordered to be registered." Signed, "John Giles, Clerk." Its admissibility was objected to by the defendants on the ground of the insufficiency of the clerk's certificate; but it was received. And plaintiff further gave in evidence that a partition was made by commissioners in November, 1831, under a decree of the county court, at the instance of the said Alexander and Judith, and their brothers and sisters, to whom the deed was made, which was returned to November Term, 1831, and there confirmed, recorded, and ordered to be registered; and that therein a certain parcel was allotted to said Judith in severalty as her (125) share of the said lands, and certain other parts to each of the other brothers and sisters, and that the said parties severally took possession of the parcels allotted to them respectively; and the parcel allotted to Judith was, in said partition, described as "lot No. 2, and the tract of land purchased by Samuel Jones of Joseph Sparks, with the following additions and boundaries: Beginning at a mulberry on the river bank, Samuel Jones's old corner; thence along and past his old line to a white oak; thence S. 83½ W. 60 chains to a stake—it being the lower end and remainder of a tract of land purchased by Thomas Oaks, deceased, of Isaac Jones, sheriff, as the property of Samuel Jones." And plaintiff further gave in evidence that the said Judith and one William W. Long

intermarried, and being in possession under the partition, they joined in executing a deed of bargain and sale for the premises to the said Alexander Oaks and his heirs, bearing date 21 November, 1839; and that said Alexander entered into the premises, claiming under the said deed, and that the defendants were in possession thereof at the commencement of this suit as the tenants under the said Alexander for a term of years; and that William W. Long died early in 1840; and that the said Judith was never privily examined touching the execution of the said deed by her.

Defendants then gave evidence that Alexander Oaks and those claiming under him had been in the continued possession of the premises from 21 November, 1839, claiming them adversely under the last mentioned deed.

Thereupon plaintiff gave in evidence the record of an action of ejectment against one William J. Markland, which was commenced on 8 May, 1843, in which the declaration was upon the several demises (126) of Judith Long and six other persons bearing the same names with the persons whose demises are laid in the declaration in this suit—each declaration describing the premises by the terms used in the allotment to Judith Long in the partition, in which action Markland appeared and pleaded not guilty, and a verdict was given for the plaintiff; but the same was afterwards set aside by the court and a nonsuit ordered 1 October, 1848. And plaintiff gave further evidence that when the said suit was commenced Markland was in possession of the premises as a tenant under Alexander Oaks for a term which expired; and thereupon Markland left the premises and the present defendants entered as aforesaid.

Counsel for defendants moved the court to instruct the jury that the plaintiff could not recover, because he had not shown the title to be out of the State, and if that were otherwise, because the entry of Judith Long and the other lessors of the plaintiff was barred by the statute of limitations, and if not, because tenants in common or joint tenants cannot maintain ejectment against a cotenant without showing an actual ouster. But the court refused to give those instructions, and informed the jury that the deed from William W. Long and his wife, Judith, one of the lessors of the plaintiff, did not bind her, but conveyed only the husband's life estate, and that upon his death her right of entry accrued, and that she had seven years from that period to enter or bring suit; and that Alexander Oaks and his tenants were estopped by the said deed and partition, and the possession taken under them, to deny the title of the said Judith to the premises, and that this suit was brought in due time after the nonsuit in the first action, to prevent her from being barred by the statute of limitations, provided the two suits were between the same

parties and for the same subject-matter; and his Honor left it (127) to the jury to say whether the parties with the same names were the same persons, and whether the matter in controversy was the same; and directed them, if they should think they were, that the plaintiff was entitled to recover on the demise of Judith Long, and in that event it was unnecessary to consider the question whether the action could be maintained upon the other demises. The jury found, accordingly, for the plaintiff, and defendant appealed.

Gilmer and Miller for plaintiff.
No counsel for defendant.

RUFFIN, C. J. Upon the question of evidence the Court is inclined to the opinion that the clerk's certificate of the acknowledgment of the deed, though very loose, would probably do, since the inferences are fair that it was acknowledged by the bargainors in the county court. But it is not of much consequence in this case whether that deed be admitted or not, for the same estoppels, arising out of the partition (*Mills v. Witherington,* 19 N. C., 433), and the deed from the lessor of the plaintiff, Judith Long and her husband, are conclusive as to the title. On this last point, *Ives v. Sawyer*, 20 N. C., 179, is decisive, as the deed describes the land as that derived by the *feme* under the partition.

The material question is that respecting the statute of limitations. Under the act of 1715 undoubtedly the right of entry was gone as more than seven years had expired after the husband's death before the present suit was brought, and a nonsuit in a previous action of ejectment, which was brought within the seven years, would not prevent the bar. *Morrison v. Conolly,* 13 N. C., 233. But in revising the statutes in 1836 the act of 1715 was amended by adding a further proviso, "that if in an action of ejectment judgment be given for the plaintiff and (128) be reversed for error, or a verdict pass for the plaintiff and judgment be arrested, or a verdict be given against the plaintiff, the party plaintiff, his heirs or executors, may commence a new action or suit, from time to time, within one year after such judgment, reversed or judgment given against the plaintiff." This provision was imported from section 4, where it stands as a proviso, enlarging the time for bringing personal actions, and is obviously expressed inartificially in reference to a right of entry or an action of ejectment. No doubt it was intended to take the place of St. 4 Anne, ch. 16, sec. 16, which enacted "that no claim or entry should be sufficient, within the St. 21 Jac., unless an action should be commenced within one year and prosecuted with effect." The object of that enactment was to prevent an evasion of the Statute of James by making an actual entry just before

the expiration of twenty years, and thereby getting twenty more, and so on perpetually; which was effected by enlarging the time of entry for only one year after an entry within twenty years, provided it was followed by an effectual suit brought within the year, but not afterwards. That was not reënacted in 1836, and of course is not the law now; but instead of it the proviso now under consideration was adopted, which is so differently expressed as to require a different construction in order to carry out the legislative intention. As applied to this case, the opinion of the Court is that it entitles the plaintiff to recover. Although a nonsuit is not mentioned as one of the modes of determination of the first suit, yet it would be within the equity of this proviso upon the same principle on which it was held to be within that in section 4, were the two expressed precisely alike. But the proviso to section 1 goes further than the other in this: that it applies to this case the rule that (129) a judgment in one ejectment is not a bar to another, and allows the plaintiff, as the lessor of the plaintiff is called, to bring a second ejectment within a year after a verdict and judgment against the plaintiff in a former action. It follows that, *a fortiori*, he may do so after a nonsuit.

Then it is to be further considered in reference to the subject-matter and the parties to the two suits. As to the former, there can be no question in this case. The description of the premises demanded in the two declarations is the same, and the jury found the identity. No doubt the lessor or lessors of the plaintiff must be the same in both actions, or their representatives must take their places. But when there are several demises of divers persons in the first declaration, it cannot be necessary that a demise from each of those persons should be laid in the second, but it must be sufficient for the second declaration to be on the single demise of that of one or more of the lessors in the former suit in whom title is found to have been; for the count on each of the several demises is in law the same as a separate action, and therefore the title of each person is saved who was a several lessor in such action. For the object is to preserve the right of any person having it at the time of instituting an action on his title; and it ought not to harm the true owner that the declaration sets forth separate demises of others, provided each declaration has a count on the demise of the true owner. Such is this case. For the demise of Judith Long is the only one on which the verdict is given for the plaintiff, and under the instructions and evidence it must be understood that the jury found the title to have been in her alone at the bringing of the first suit.

Upon the necessity of the identity of the defendant in the two actions, the opinion of the Court differs somewhat from that given to the jury,

but not so as to affect this judgment. If it were true that this proviso, like that in the fourth section, had in view only the case of the same defendants in both actions, it yet might fairly be construed (130) to embrace the case of outgoing and incoming tenants of the same landlord. But there seems to be no ground for any such restriction, nor any reason why, after an action brought against the actual occupiers at the time, another action, upon failure of the first, should not lie within a year against the actual occupier at the time, whoever he may be. If it were not so, then in every case in which the seven years had expired pending the action, the defendant, by afterwards aliening to another, or even by vacating the possession, would defeat the proviso and bar the right of entry. So, if an action within the year would not lie against a stranger who entered when the possession was vacant, there would be the absurdity that he could insist on the possession of a former tenant as a bar, which the former tenant himself could not set up had he continued in possession. Such consequences forbid a construction which produces them, and they show the true principle of the enactment to be that by bringing ejectment a party then having the right of entry shall continue to have it as long as that action pends, and afterwards also if within one year afterwards he will bring another action, and so on from time to time. That is the clearer when it is considered that this enactment is in the form of a proviso to a general enactment in the beginning of the section, which bars the right to enter into lands but within seven years after the right accrued; and, therefore, that its office, like that of previous provisos respecting persons under incapacities, is to extend the right of entry to the period prescribed in it. Besides, in giving the second action of ejectment, the proviso implies that the lessor of the plaintiff therein has the right of entry at the time of suit brought. If he has it at all he may assert it either by entering on any person unlawfully in possession or by bringing an ejectment. The (131) Court is well aware of the consequence of this construction, as it leaves the right of entry without limitation, if the party entitled will bring an ejectment within seven years, and successive actions afterwards within a year after a verdict even against him in a prior suit. But the terms of the act and the nature of the rights on which it operates render it the unavoidable construction, and if it prove a mischief it is not for the judiciary but the Legislature to apply the corrective by adopting a provision similar to that in the Statute of Anne, or requiring the second or some certain one of the actions to be prosecuted with effect or in some other way giving the repose to which long possessions are entitled, in policy and justice.

PER CURIAM. Affirmed.

Cited: Williams v. Council, 49 N. C., 211; *Freshwater v. Baker*, 52 N. C., 256; *Prevatt v. Harrelson*, 132 N. C., 254; *Locklear v. Bullard*, 133 N. C., 265; *Trull v. R. R.*, 151 N. C., 540; *Weston v. Lumber Co.*, 162 N. C., 192; *Quelch v. Futch*, 174 N. C., 396.

(132)

DEN ON DEMISE OF WILLIAM J. HARDY ET AL. *v.* SAMUEL SIMPSON.

1. What constitutes fraud is a question of law.
2. In some cases fraud is *self-evident*, when it is the province of the court so to adjudge, and the jury has nothing to do with it.
3. In other cases it depends upon a variety of circumstances, arising from the motive and intent, and then it must be left as an open question of fact to the jury, with instruction as to what in law constitutes fraud.
4. And in other cases there is a presumption of fraud, which may be rebutted. Then, if there is any evidence tending to rebut it, that must be submitted to the jury; but if there is no such evidence, it is the duty of the court so to adjudge, and to act upon the presumption.

APPEAL from *Settle, J.*, at Fall Term, 1851, of CHOWAN.

The case is stated in the opinion delivered in this Court.

Heath for plaintiff.
W. N. H. Smith for defendant.

PEARSON, J. Both parties claim under William Skinner. The lessor deduces title by a sale and deed of the sheriff in 1845 under a judgment against Skinner, in August, 1841, and executions regularly issuing
(137) thereon up to the sale. The defendant deduces title by a deed of trust executed by Skinner to one James Skinner in April, 1841, and a deed from James C. Skinner to himself in 1846. The case, therefore, turns upon the validity of the deed of trust. It conveys to James Skinner the land sued for and several slaves, and all the other visible property of William Skinner in trust to sell, and out of the proceeds to pay certain debts, which constitute the first class; and if there is any surplus, to apply it to the payment of the debts of the second class. It provides that the property is not to be sold until after the expiration of three years from the date, and then, if any of the debts of the second class shall remain unpaid, the trustee may be required by such portion of the creditors of the second class as represent the greater interest to proceed to sell; and he is thereupon authorized to sell the property at public auction on a credit of six months. It further provides that, until

a sale is made, William Skinner shall remain in possession of all the property, and Skinner shall not be held responsible for the same while it remains in the possession of the said William.

To account for this delay of three years and the stipulation that during the time the debtor was to be allowed to keep possession of the property and receive the profits, without responsibility on the part of the trustee, the defendant examined Thomas F. Jones, Esq., James Skinner, and William Skinner. Their testimony was, in substance, that William Skinner was a merchant, and also carried on a small farm. In the spring of 1841 he found himself very much embarrassed; he was indebted to James Skinner, who was his brother, in a large amount, chiefly for money borrowed of him as guardian; he also owed large sums to several of his intimate friends. These creditors were willing to give him indulgence, provided their debts were secured, and he was anxious to give them the preference, and supposed that his land, (138) negroes, and all of his other chattel property would be about sufficient for that purpose. Besides these debts, he owned several merchants for goods to quite a large amount, and in taking an estimate of the notes, book debts, etc., due on account of the store, he supposed this fund, if he was successful in making collections, in addition to the profits of his farm, would enable him in three or four years to pay off most of the debts due to merchants, and several small debts due in the neighborhood, which he did not purpose to secure; and he communicated this to his brother, and they called on Mr. Jones, a highly respectable gentleman of the bar, to draw the deed of trust. They stated over the above circumstances to Mr. Jones, and told him their wish was to postpone a sale of the property as long as the law would allow, and suggested four years. He advised them that time was too long, but thought the deed would not be invalidated by a delay of three years, which was inserted, and the deed was executed and registered. William Skinner stated that he was much mistaken in reference to the amount which he had hoped to realize from the notes and debts due on account of the store, and although the nominal amount was some $4,000, his collections fell far short of the amount of debts secured in the second class, and the result was he proved to be insolvent to a large amount. He accounted for his want of success in making collections by the fact that in 1842 there was a great pecuniary pressure and an almost total failure in that section of the State; this fact was also stated by Mr. Jones.

Plaintiff's counsel insisted that the deed of trust was fraudulent upon its face, and should be so adjudged by the court. His Honor was of opinion that the question of fraud was one of fact, to be submitted to

(139) the jury. For this the plaintiff excepts. The court then submitted the case to the jury, with general instructions as to the question of fraud.

Plaintiff's counsel then requested the court to instruct the jury that upon the face of the deed of trust there was *prima facie* evidence of fraud, and that the defendant had offered no evidence to explain or rebut this presumption. The court declined giving the instruction, and for this the plaintiff excepts.

The first exception is unfounded. The very question is settled by *Hardy v. Skinner*, 31 N. C., 191, when this same deed of trust was submitted to the consideration of this Court, and the matter is so elaborately discussed as to make it unnecessary to add another word.

The second exception is well founded. In *Hardy v. Skinner* it is decided that, upon the face of this deed of trust, there is a presumption of fraud; and the single point is, Was there any evidence to rebut this presumption? Plaintiff had a right to present this point, as upon a demurrer to the evidence; that is, admitting all of the testimony offered by the defendant to be true, and admitting all the inferences that can properly be drawn from it, there is no evidence to rebut the presumption, and to ask for a direct opinion of the Court upon that question. Consequently, it is error to refuse the opinion and to leave the case with the jury upon a general charge as to the matter of fraud. What constitutes fraud is a question of law. In some cases the fraud is *self-evident*, when it is the province of the court so to adjudge, and the jury has nothing to do with it. In other cases it depends upon a variety of circumstances arising from the motive and intent; then it must be left as an open question of fact to the jury, with instructions as to what in law constitutes fraud. And in other cases there is a presumption of fraud,
(140) which may be rebutted. Then, if there is any evidence tending to rebut it, that must be submitted to the jury; but if there is no such evidence, it is the duty of the court so to adjudge, and to act upon the presumption. Fraud is very subtle, and frequently eludes the grasp both of the court and jury. When, therefore, the court has hold of it, there is no reason for passing it over to the jury, unless there is some evidence that will justify them in coming to the conclusion that the presumption is rebutted.

In one case it had been decided that there was a presumption of fraud against this deed of trust, and it was narrowed down to this question, Is there any evidence to rebut this presumption? The legal effect of the deed is to delay and hinder the creditors named in the second class, and to hold them at arm's length for three years; because, so far as the personal property was concerned, it could not be reached by an execution,

and the *equity of redemption in the land only* could be sold, which would impose on the purchaser the necessity of going into equity to redeem, by paying *all the debts*. Of course, there would be no purchaser, so that, in fact, the admitted design was to hold off the creditors of the second class for three years, during which time the debtor was to remain in possession and the receipt of the profits upon his own responsibility. What motive does the evidence assign for this? The creditor wished to prefer certain creditors; true he had a right to do it, but he was bound to make an honest preference. He could have given them the very same preference and allowed the sale to be made within a reasonable time; so his wish to give the preference furnishes no reason for the delay and leaves it as a new pretext under which to provide for a benefit to himself. But again, it is said the evidence shows that he expected to be able within the three years to make large collections from his (141) books, which he could do by taking in grain, etc., much better than a trustee; and he left his notes and accounts out of the deed of trust for the purpose of settling them up himself. Grant it, but does this furnish any reason why his other property should not in the meantime have been appropriated to the payment of his debts, so as to stop interest and close up the business? Upon what principle does this self-constituted agency of his rest? He being *insolvent*, or at least greatly embarrassed and on the verge of insolvency, as it afterwards turned out, assumes the right to defy his creditors and enjoy the use of his property for three years—in other words, to keep his property and pay his creditors when he finds it convenient. This assumption shocks all notion of honesty and fair dealing and cannot be tolerated. *Lee v. Flannagan*, 29 N. C., 471, and *Young v. Booe*, 33 N. C., 347, were cited for the defendant.

The distinctions are obvious.

PER CURIAM. *Venire de novo* awarded.

Cited: *Benton v. Saunders*, 44 N. C., 365; *Gilmer v. Earnhardt*, 46 N. C., 560; *McCorkle v. Hammond*, 47 N. C., 448; *Grimsley v. Hooker*, 56 N. C., 7; *Jessup v. Johnston*, 48 N. C., 338; *Credle v. Gibbs*, 65 N. C., 192; *Isler v. Foy*, 66 N. C., 551; *Starke v. Etheridge*, 71 N. C., 247; *Cheatham v. Hawkins*, 76 N. C., 338; *Boone v. Hardie*, 83 N. C., 475; *McCaddess v. Flinchum*, 89 N. C., 375; *Brown v. Mitchell*, 102 N. C., 369; *Woodruff v. Bowles*, 104 N. C., 206; *Bobbitt v. Rodwell*, 105 N. C., 243; *Helms v. Green*, *ibid.*, 259; *Booth v. Carstarphen*, 107 N. C., 400; *Orrender v. Chaffin*, 109 N. C., 425; *Davis v. Smith*, 113 N. C., 100; *Hobbs v. Cashwell*, 152 N. C., 191.

Dist.: *Palmer v. Giles*, 58 N. C., 79.

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STEPHEN SASSER v. BENNET ROUSE.

1. In an action of slander a plaintiff has no right to ask a witness what he considers to be the meaning of the words spoken, except in the cases:

2. *First.* Where the words in the ordinary meaning do not import a slanderous charge, *if they are susceptible of such a meaning*, and the plaintiff *avers* a fact, from which it may be inferred that they were used for the purpose of making the charge, he may prove such averment, and then the jury must decide whether the defendant used the words in the sense implied or not.

3. *Secondly.* The exception is, where a charge is made by using a cant phrase, or words having a local meaning, or a nickname, when advantage is taken of a fact known to the person spoken to, in order to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such fact, then the plaintiff must make an averment to that effect, and may prove not only the truth of the averment, but also that *the words were so understood by the person to whom they were addressed;* for otherwise they are without point, and harmless.

APPEAL from *Dick, J.*, at Fall Term, 1851, of WAYNE.

The case is stated in the opinion delivered in this Court.

A verdict was rendered below in favor of the plaintiff, and from the judgment the defendant appealed.

W. H. Haywood for plaintiff.
McRae for defendant.

PEARSON, J. This was an action of slander. The words charged in the declaration were that the defendant, in speaking of the plaintiff, said "He did take and sell $90 worth of my pork and lay out three nights in town, and refused to give up the money until Griffin threatened to send a writ to Wayne County; I have kept it no secret," intend-
(143) ing thereby to charge the plaintiff with stealing his pork or his money.

One Moses was called by the plaintiff. He stated that the defendant, in the presence of himself and one or two others, speaking of the plaintiff, said, "He did sell $90 worth of my pork in November, and lay out three nights, and would not give up the money until Griffin threatened to send a writ to the county of Wayne; I have kept it no secret." The witness then told him he and the plaintiff had better make it up. He replied, "D—n him, I ask him no odds; I can prove the charge by Richard Hinson." The witness was then asked what he understood the defendant to mean by using the above language concerning the plaintiff.

This question was objected to, but was admitted. Witness said that he inferred that the defendant intended to charge the plaintiff with stealing his pork or his money. For this the defendant excepts.

This exception is well founded, and as it meets the merits of the case, we put our decision upon it, and it is not necessary to state the other points. It should be remarked, in the first place, there is a variance between the words charged and those proven: in this the witness does not use the word "take," but says, "did sell $90 worth of my pork," etc. This may be a fatal variance, but we pass it by and consider the words proven to be the words charged. We are at a loss for a conjecture upon what principle the inference of the witness, as to the meaning of the words, can properly be substituted for that which it was the province of the court or jury to make, and can account for the reception of the evidence only on the ground that his Honor mistook a *restricted exception* for the rule. The general rule is, words are to be taken in their ordinary acceptation, and it is the duty of the court to decide whether they do or do not import a charge which is slanderous. For this purpose it is necessary to set out in the declaration the very words (144) which are spoken.

The first exception in favor of the plaintiff is, although the words do not in their ordinary meaning import a slanderous charge, yet *if they are susceptible of such a meaning*, and the plaintiff *avers a fact*, from which it may be inferred that they were used for the purpose of making the charge, upon proof of this averment it should be left to the jury to say whether the defendant used the words in the sense imputed and not in their ordinary sense; for example, if there is an averment that the horse of the defendant had been stolen by some one, and after the supposed felony the defendant, speaking of the plaintiff, says, "I have found out *that he is the man who took my horse*," although the word "take" does not in its ordinary signification mean to steal, yet upon proof of the averment it is proper to submit to the jury whether it was not used in that sense. So if there is an averment that the plaintiff had been examined as a witness in court, and the words are, *"he is forsworn,"* upon proof of the averment it might be left to the jury whether the word "forsworn" was used in the sense of having committed perjury.

The second exception is still more restricted, and is explained in *Briggs v. Byrd*, 33 N. C., 358, in these words: "When a charge is made by using a cant phrase, or words having a local meaning, or a nickname, when advantage is taken of a fact known to the persons spoken to, in order to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is bound to make an averment of the meaning of such cant phrases or nicknames

or of the existence of such collateral fact, for the purpose of giving point to the words and of showing that the defendant meant to make (145) the charge complained of; and in such cases there must also be an averment that the *words were so understood by the person to whom they were addressed;* for otherwise they are without point, and harmless. These averments are traversable, and must be proven." This is the only case in which a witness is allowed to give his understanding of the meaning of the words, and that from necessity, because the averment cannot be proved in any other way.

A third exception in favor of defendant, and it corresponds with the first exception in favor of plaintiff, is this: Although the words do import a slanderous charge, yet the defendant, upon proof of a fact, from which it may be inferred that they were not used in that sense, may insist that it should be left to the jury to say in what sense he used them. As if the defendant says to the plaintiff, "She *murdered* A. B.": upon proof that A. B. was a young gentleman who had addressed the plaintiff and was rejected, it should be left to the jury to say in what sense the word "*murdered*" was used; whereas, in the absence of such proof, it would be the duty of the court to adjudge that the words imported a charge which was slanderous.

The present case falls under the general rule, for the words proven are susceptible of a meaning whereby to charge the plaintiff with having committed larceny. Taking the words as set out in the declaration, they are not brought within the first exception, because no fact is averred by which to give them a meaning other than their ordinary signification. There is no reason whatever for supposing the case to come within the second exception, and unless it does, there is no ground upon which it was admissible to ask the witness in what sense he understood the words, or what was his inference as to the defendant's meaning. Without the restrictions above pointed out, any man would be liable to be sued (146) for slander who has the misfortune to speak in the presence of an ignorant or of a prejudiced or of a corrupt witness, although the words used by him do not, in their ordinary acceptation, import a charge which is slanderous; for the misapprehension of the witness, whether real or pretended, is thus to be substituted in the place of the inference which it is the duty of the court to make as to the meaning of words.

Counsel for plaintiff cited *Hamilton v. Smith,* 19 N. C., 274. We do not see that it is at all opposed to our conclusion; on the contrary, it is consistent with and illustrates the view of the subject which we have taken.

PER CURIAM. *Venire de novo.*

Cited: Jones v. Jones, 46 N. C., 498; *Mebane v. Sellers,* 48 N. C., 201; *Pitts v. Pace,* 52 N. C., 560; *Sowers v. Sowers,* 87 N. C., 306; *Reeves v. Bowden,* 97 N. C., 32; *S. v. Howard,* 169 N. C., 314.

JOSEPH H. BENNETT v. JOHN THOMPSON.

1. In an action of trespass for cutting down timber trees, the rule of damages is the value of the timber when it is first cut down and becomes a chattel.
2. This rule, however, *it seems,* is not applicable to cases of cutting down ornamental trees, or where the trespass is attended with circumstances of aggravation.

APPEAL from *Dick, J.,* at Spring Term, 1851, of BERTIE.

The case is stated in the opinion.

Smith for plaintiff.
Bragg for defendant.

NASH, J. The plaintiff and defendant are the owners of con- (147) tiguous tracts of land, and both derive title under the Tuscarora tribe of Indians. One question in the case is as to the boundary of their respective tracts. Plaintiff proved a regular claim of title from John McKashey, to whom the Tuscaroras had leased it by deed in 1777. Defendant deduced title from one Williams, to whom the Indians had conveyed by lease dated in 1803. In the lease of 1777 a particular cypress is called for; a cypress is also called for in the lease to Williams; and to show that the tree called for in the latter is the same as that called for in the former, and the line leading from it was the true one, plaintiff offered in evidence a deed from the Indians to Slade, Griffin, and others, executed in 1803, a few days after the lease to Williams; and also a grant from the State to one Pugh, issued in 1830. To this testimony defendant objected, but it was received by the court.

Upon this exception no opinion is expressed. From the statement in the case we cannot see what bearing those two or either of them have or can have upon the point in dispute. We are told the purpose for which they were offered and received, but not how they were to answer that purpose. The objection upon which the case has been principally pressed before us is as to the reception of the testimony as to the damages to which the plaintiff was or might be entitled. The trespass complained of was in cutting down timber. To show the amount of damages

to which he was entitled, the plaintiff was permitted to give evidence "of the value of the logs when cut and sawed into boards and when worked into shingles, their value in logs, shingles, and boards on the spot when cut on the river and at the markets of Plymouth and Edenton, and also to show the expense of cutting down, sawing off, floating out, rafting and getting the logs to market, and their value at the cost of
(148) getting them into shingles, and the value of the shingles of several kinds, and of getting them into boards, and the value of the boards at said markets." This testimony was objected to by the defendant, but admitted by the court. In the charge the jury was instructed "that the rule and measure of the damages was such an amount as would compensate the plaintiff for the injury sustained, and all the evidence admitted was to assist them in forming a correct and proper estimate of the injury sustained by the plaintiff."

No fault is found with the rule laid down by his Honor as to the damages to which the plaintiff was entitled—that is, the amount of the injury sustained; but he entirely omitted to state the principles upon which the rule was to be applied, and by the admission of the testimony objected to adopted a principle not applicable to the case he was trying. The question was how, in an action of trespass, the value of the timber taken was to be estimated, and his Honor informed the jury that the testimony was admitted to assist them in making that estimate. If, then, the evidence introduced into the inquiry an incorrect principle, which was calculated to mislead the jury without a particular explanation of its proper meaning, it was wrong to admit it. There was error, for which there ought to be a new *venire*. The testimony objected to was avowedly offered by the plaintiff to show the amount of damages he was entitled to. With that view he was suffered to prove what was the value of the timber cut at market when manufactured into boards and shingles, deducting the expenses incurred by the defendant in preparing and carrying them to market. This is not the principle as applicable to this action. The plaintiff was entitled to the value of the timber as a chattel, which it became as soon as it was severed from the land at the stump, as it is said. The price at which it could have been sold where it was felled was the pecuniary loss of the plaintiff.
(149) In *Porter v. Mackie*, 5 M. & S., 361, which was an action of trespass for digging and carrying away coal from the plaintiff's coal mine, the Court say the plaintiff was entitled to the value of the coal at the time when the defendant began to carry it away—that is, as soon as it existed as a chattel. In *Morgan v. Powell*, 3 Adol. & Ellis, 278, the same doctrine is held. *Lord Denman* says, "The jury must give compensation for the pecuniary loss sustained by the plaintiff from the

trespass committed, and the estimate of that loss depends on the value of the coal when severed." In both these cases the Court say the defendant was entitled to be reimbursed his costs in getting the coal to the mouth of the pit, because it could have no value as a saleable article without being taken from the pit; and that was the earliest moment at which the plaintiff could have repossessed himself of the coal. Upon this principle the defendant is entitled to no compensation for floating down the timber out of the swamp into the river, nor for any of his expenditures for manufacturing it or getting it to market, the true rule being, in an action of trespass, the value of the timber. It is not to be understood that the rule of damages stated above applies to the cutting down of ornamental trees or to the cutting of timber with any circumstances of aggravation, as in this case, for here there was a dispute as to the boundaries of their respective tracts. For the error in admitting the evidence the judgment is reversed and a

PER CURIAM. *Venire de novo.*

Cited: Walling v. Burroughs, 43 N. C., 61; *Burnett v. Thompson,* 48 N. C., 113; *Potter v. Mardre,* 74 N. C., 40; *Gaskins v. Davis,* 115 N. C., 88; *Williams v. Lumber Co.,* 154 N. C., 310; *Wall v. Holloman,* 156 N. C., 276.

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(150)

DEN ON DEMISE OF REBECCA R. CRUMP v. JOSHUA H. THOMPSON.

An attempt to procession land under the act, Rev. Stat., ch. 91, is not embraced in the last proviso of the first section of the act of limitations, Rev. Stat., ch. 65, so as to prevent actions of ejectment from being barred, if brought within one year after a failure to recover in a preceding action.

APPEAL from *Bailey, J.,* at Spring Term, 1851, of DAVIDSON.

Action was commenced on 16 August, 1845. On the trial, plaintiff gave in evidence a grant from the State to Thomas Monroe, dated November, 1792, which covered the premises described in the declaration, and proved that he died before 1845, and that the lessor of the plaintiff was his only child. Plaintiff further gave evidence that the defendant was in possession of a part of the land covered by the grant. On the part of defendant a grant to Dolan and Holeman, dated in 1752, and a deed from Dolan and Holeman to Edward Williams, were given in evidence; but the defendant did not give evidence that those conveyances

covered any part of the premises. Defendant then gave in evidence a deed from Edward Williams to Richard Pearson, dated in 1791, which covered the part of the premises which was in defendant's possession; and also a deed for the same from said Pearson to Nathaniel Peebles, dated in 1817, and that defendant in 1844 came in by *mesne* conveyances under Peebles. Defendant further gave evidence that in 1835 Peebles built a cabin and also a still-house on the land claimed by defendant, and placed two of his slaves in the cabin, and his stills and
(151) stilling apparatus in the still-house, and that his slaves remained there, and he used the distillery until the spring of 1838, when he removed the slaves and stopped distilling, but that the stills and beer-tubs remained in the still-house; and that in June, 1838, defendant leased the land to one Towe for a term of years; but that in August, 1838, Towe, by the consent of the defendant, repaired the dwelling-house and prepared and farmed a piece of land around the house to make a crop of turnips, and sowed them on the 10th day of the month; and in December, 1838, he (Towe) removed to the place with his family, and he and defendant continued in possession afterwards up to the commencement of this suit.

Plaintiff gave in evidence a record from the county court, wherein it appeared that on 3 July, 1845, the lessor of the plaintiff gave to the defendant a notice in writing that on 15 July "I shall proceed to procession my land, to begin at the hickory tree on the river bank, and commence at 9 o'clock a.m.;" and that to the next county court, sitting on the second Monday of August, 1845, the processioner returned his certificate that, being called on to procession the lands of Rebecca R. Crump, he commenced, on 15 July, 1845, at a hickory on the river bank, and ran thence, etc., to a store; "and then was about to run east 20 chains to a post-oak, when I was forbidden to proceed any further by Joseph F. Thompson, who contends that the line runs from the said store south 55 degrees west instead of due east, and, consequently, the lines lie in dispute between said parties." And it further appeared therein that the proceeding was dismissed at that time.

(152) Counsel for plaintiff therefore prayed the court to instruct the jury that, even if they should believe that Towe fenced and sowed a turnip patch on the premises as early as 10 August, 1838, and that he and the defendant have continued the possession ever since, the plaintiff would be entitled to recover, because the proceedings begun by the lessor of the plaintiff in July, 1845, to procession her land constituted such a suit or claim as prevented her right from being barred at the commencement of the present suit. The court refused to give the instruction, and told the jury that if the possession of the defendant and of those under whom he claims did not commence before 10 August, 1838, yet, as it had

continued ever since, and for more than seven years, the plaintiff was not entitled to recover. Verdict and judgment for defendant, and plaintiff appealed.

No counsel for plaintiff.
Gilmer and Miller for defendant.

RUFFIN, C. J. It must be understood that the lessor of the plaintiff made no entry in July, 1845, on the land claimed by the defendant, but stopped at the corner, from which the first disputed line ran; and, therefore, that the single question is whether an attempt to procession land is within the last proviso in the first section of the act of limitations, which is that after failing in one action of ejectment the party may bring another within one year, though the latter be brought after seven years adverse possession. The Court is of opinion that it is not. Before that proviso was inserted in 1836 the owner of land, in order to avoid the bar of such possession, was obliged to assert his claim by making an actual entry before the expiration of seven years. But under the proviso it may be done by an ejectment "for the recovery of the lands," because in that mode the possession will be taken from the wrongdoer and given to the owner. That is, instead of entering on his own authority merely, upon a claim of right, the law substitutes his (153) effort to obtain peaceable possession by process of law, after an adjudication of title, and makes that keep alive the right of entry for a year after the determination of the action in which the possession was demanded. The nature of processioning, however, seems to be entirely different. Its purpose is solely to establish, as the true boundaries of the land of the party asking it, the particular lines reported by the processioner or freeholders. But there is no judgment given of recovery by the court, much less an execution affecting the possession. On the contrary, the possession is not demanded, and the proceeding does not suppose one adverse to the processioning party, but rather that he is in possession of what he claims, so far as any can be distinctly collected; for in the fourth section of the act, Rev. Stat., ch. 91, which prescribes the effect of processioning, as it is called, the provision is that every person whose lands shall be processioned two several times shall be deemed the true owner, and that, upon any suit for such lands, the party in possession may plead the general issue and give the act in evidence. It seems to have been the purpose merely that persons possessing or claiming contiguous tracts of land, instead of resorting to an ordinary action at law to try the question of boundary, might have this less expensive and sometimes, perhaps, as satisfactory summary mode for selling the boundaries; and when thus settled, to make the proceeding evidence of

title up to those lines as the true boundaries. But it was not intended that the possession should be drawn in question nor in any other respects to substitute this proceeding for an ejectment, by submitting to five freeholders in the premises the general question of title, arising upon inquiries as to the due execution of a will, the construction of the devises in it, an allegation of fraud in a conveyance, or the length
(154) and nature of a party's possession in reference to the statute of limitations. At all events, the proceeding is not to affect the possession of either party, but that is left as the subject of another suit, unless voluntarily abandoned by settling the boundary. Therefore, the defendant's possession was not disturbed nor even demanded until it was done in this action, which was a few days too late.

PER CURIAM. Affirmed.

STATE v. NAT, A SLAVE.

1. Under the Revised Statutes, ch. 111, sec. 31, a master is not indictable for permitting his slave to go at large, hiring his own time: he is only subject to the penalty of $40 imposed by that section of the act. Nor is the slave indictable.

2. But the owner is indictable, under section 32 of the same act, for permitting a slave to go at large *as a free man*, exercising his own discretion in the employment of his time.

(155) APPEAL from *Dick, J.*, at Fall Term, 1851, of BEAUFORT.

Indictment against the defendant, a slave, for hiring his time contrary to the act of Assembly. The indictment was as follows: The jurors, etc., present that Nat, a slave, the property of John Carmatt, at and in the county, etc., at, etc., and on other days, etc., by the permission of the said John Carmatt his master, unlawfully did go at large, the said slave having then and there unlawfully hired his own time of his said master, contrary to the form, etc. The State proved by one Crutch that Nat, the defendant, during the whole of 1850, spent a large portion of his time on Blount's Creek, where he had a wife, about 12 miles from the town of Washington, and that he was engaged in running a boat on the river and carrying turpentine and other articles to Washington and back again to Blount's Creek; that he appeared to have the control of his own time, and was not subject to the order or control of any one, so far as the witness saw or heard. There was a white man by the name of Pritchet in the boat with Nat the first half of the year 1850, but the latter part of the year Nat run the boat alone. The witness further stated

that he hired Nat three days to work in his new-ground, in May, 1850, and paid Nat for his work. The witness was then asked what Nat said about hiring his time from his master. The question was objected to by defendant's counsel, but allowed by the court. Witness stated Nat told him while he was at work for him that he hired his time from his master; that he was to give his master $80 a year and pay him quarterly. Nat further stated, he and Pritchet were partners in running the boat; that they gave the owner of the boat one-half of what they made, and divided the balance between them. Mr. Tripp was then examined, and made about the same statement as the witness Crutch. The jury, under the instruction of the court, found the defendant guilty. Defendant's counsel moved for a new trial because the court had (156) admitted the declaration of Nat as to hiring his time from his master. The court refused to grant a new trial. Defendant then prayed for and obtained an appeal to the Supreme Court.

Attorney-General for the State.
Donnell for defendant.

NASH, J. *S. v. Clarissa, a slave,* 27 N. C., 221, has been referred to as an authority in this case to sustain the jurisdiction of the Superior Court of Beaufort over the offense charged in the indictment in this case. We are relieved from any embarrassment in overruling a decision of this Court. It is so important to the citizens of the country that the law should be finally settled, and, when settled by a series of adjudications, steadily adhered to, that I cannot bring myself to depart from it, though I may question the soundness of the cases establishing it. In this case there is no difficulty of that character. The decision (157) in that case we adhere to as correct. That portion of the opinion bearing upon the question now before us may be considered as an *obiter dictum,* and in no way important to the decision of the case then under adjudication. It is so manifestly wrong that we are at a loss to account for it. The act of 1794, constituting section 31, chapter 111 Revised Statutes, is not repealed by the act of 1831, constituting section 32 of the Revised Statute. They operate upon separate and distinct offenses. Section 31 forbids persons to suffer their slaves to hire their own time, and punishes them, when they do so, by the loss of the services of their slave for a limited time and the forfeiture of $40, "to be recovered before any justice of the peace, to the sole benefit of the party prosecuting." The clause then points out how the slave is to be dealt with. The grand juries, both of the county and Superior Courts, are directed to present all slaves within their respective counties who do so hire their own time and are permitted to go at large. If the presentment is made in the

Superior Court, a warrant is directed to be issued to the sheriff, returnable before the next county court. It is the duty of the sheriff to have the slave there, and of the court to impanel a jury to "inquire into and try the truth of the presentment"; and upon conviction the slave is to be hired out for one year. By this section the offense of the master is clearly pointed out. The act of 1831 made no alteration in the act of 1794, but introduced a new offense, to wit, suffering a slave to go at large as a freeman. A custom had sprung up in the State, particularly among that class of citizens who were opposed to slavery, of permitting persons of color who by law are their slaves to go at large as free, thereby introducing a species of *quasi* emancipation, contrary to the law and
(158) against the policy of the State. It was to repress this evil that the act was passed, and for a violation of its provisions the master is liable to indictment under the act of 1794; for suffering his slave to hire his time and go at large the master is not indictable. The law has made a distinction between the two acts of the master. Both are evils, but not of the same grade. In the one the master still considers himself the owner of the slave, and the latter is made to feel and act as his slave; in the other, all the restraints of servitude are thrown aside—a new class of members of society introduced or attempted to be introduced, contrary to law and injurious to the community. The act of 1831 did not repeal the act of 1794, and the Superior Court of Beaufort County had no original jurisdiction of the offense charged against the defendant, and the judgment must be reversed.

I do not regret that the duty of drawing this opinion has been assigned to me. The opinion in the case of *Clarissa* was drawn by me. To retrace my steps when apprised of an error is simply a duty.

PER CURIAM. Reversed.

(159)

DEN ON DEMISE OF JOHN H. JACKSON v. IREDELL JACKSON.

1. In claiming land under an execution sale the inquiry is, Has the sheriff sold this particular land? and his return is to be taken as true until the contrary appears.

2. Where the sheriff returned, "Levied on 265 acres of land, lying, etc., whereon Iredell Jackson now lives," and in his deed conveyed two tracts, one of 100 acres and one of 165, not contiguous, but separated by another small tract, and it appeared that the defendant lived on one tract and cultivated the whole as one plantation: *Held*, that the levy and conveyance by the sheriff were not too indefinite nor inconsistent.

3. *Held further*, that in such a case parol evidence of the identity of the land was properly admissible.

APPEAL from *Manly, J.*, at Fall Term, 1851, of SURRY.

The case is stated in the opinion delivered in this Court.

Gilmer and Miller for plaintiff.
No counsel for defendant.

NASH, J. In this case the lessor of the plaintiff claimed through a judgment and execution against the defendant in favor of himself. The levy on defendant's land, under which the sale was made, was as follows: "Levied on 265 acres of land lying on the Ararat River, adjoining Tyree, Glenn, and others, whereon Iredell Jackson now lives." A further return was endorsed: "Sold the same on 10 November as the property of Iredell Jackson to John H. Jackson, for $495," etc. The defendant had title to 265 acres of land by two deeds, one for 165 acres and the other for 100. These two parcels at the same point were 15 chains distant, having a parcel of 74 acres between. Defendant's dwell- (160) ing-house was on the parcel of 165 acres, his barn on the 74, and his cultivated fields occupied portions of the three parcels (of the 100 acres, as well as the others), and the premises had been thus occupied for more than twenty years. The sheriff's deed to the lessor of the plaintiff describes the land sold as the 165 acres, and the 100 acres, and conveys them by separate descriptions. The body of the land is on the Ararat River, adjoins the lands of Tyree, Glenn, and others, and is embraced within the plaintiff's declarations.

The tax list was introduced and the justice appointed by the county court to take it, who proved that the land was given in to him as a single parcel, and was entered on the list as 165 acres, adjoining the lands of Tyree, Glenn, and others. The return of the sale and the evidence of the tax list taken were objected to, but received by the court. There was also evidence on the part of the plaintiff that the land in question was by each proprietor, as now, cultivated as one plantation, and regarded and known in the neighborhood as one parcel only. Defendant offered in evidence the record of a former suit by action of ejectment between the parties for the premises, but the court ruled it to be inadmissible. On the part of defendant it was insisted that the sheriff could not legally sell but one parcel under his levy, viz., the 165 acres; and that if he could sell more, he could sell only 265 acres, including the parcel he levied on and the lands adjoining; that the deed for 100 acres was void, and especially that a deed for two parcels, when this levy described it only as one, was void. The court instructed the jury that the levy ought to describe with certainty the things seized for sale, so as to inform the parties and the public with precision what is to be sold for the satisfaction of the debt. If the entire body of land claimed by

(161) defendant was understood to be included in the description as a single parcel, and as well known by such description as by describing the parcels by their respective boundaries, or by any other means, the levy and sale were legally sufficient to include the whole, and the sheriff's deed, notwithstanding it described the land sold as two parcels, separate from each other, would convey defendant's title to all embraced by the terms of the deed. And it was submitted as a question of fact to be inquired of by the jury, whether the description was thus comprehensive, explicit, and intelligible. Verdict for plaintiff. Defendant excepts for the admission of improper testimony, for the rejection of proper, and for error in the instructions. Rule discharged, and defendant appealed.

We concur with his Honor who tried this cause below, both in receiving the testimony objected to and in his charge to the jury. *Judge v. Houston*, 34 N. C., 108, is decisive upon both points. There the sheriff's return was, "Levied this execution on the land of S. M. Houston, on the east side of Northeast River, adjoining the lands of Stephen M. Grady and others, and after due advertisement sold the land levied on, etc., at which time and place Israel A. Judge became the last and highest bidder," etc. Defendant owned two tracts, designated on the trial as No. 1 and No. 2, which were two miles apart, and No. 2 did not adjoin the lands of Stephen M. Grady. Plaintiff was suffered, after objection by defendant, to prove by the officer who made the levy "that he intended to levy upon all the interest of the defendant in all the lands he had in the neighborhood, and that he sold all the lands in dispute, and which were before levied on, and were the same as those set forth in the sheriff's deed." The Court here decide that there was no error in the admission of the testimony. *Pearson, J.*, in delivering the opinion of the (162) Court, adverts to the difference between a levy of a constable on land and that of a sheriff under a *fi. fa.* The levy in the case we are considering is as follows: "Levied on 265 acres of land, lying on the Ararat River, adjoining the lands of Tyree, Glenn, and others, on which Iredell Jackson lives." One hundred and sixty-five acres were owned by Jackson in one body, but not contiguous with the former, and separate from it by a portion of a 74-acre tract. In this 74-acre tract was his barn, and his cultivated grounds extended to each. The evidence objected to was to prove that Jackson, the defendant, and the preceding occupiers of the land, had cultivated and used the whole land as one body for twenty years and more. It was clearly admissible, and the sheriff was justified in selling the whole. Nor is it any objection that, in making the deed to the purchaser, he described the lands as being in two tracts; they both together made out the number of acres which, by his return, he said he had levied on, and in other respects they answered the description

given. In such cases the inquiry is, Has the sheriff sold this particular land under the execution? and his return is to be taken as true until the contrary is shown. Here, there is no such attempt, aside from the separation of the two tracts, and that fact is answered by the evidence and, being a matter of fact, was properly left to the jury.

PER CURIAM. Affirmed.

Cited: Grier v. Rhyne, 67 N. C., 340; *Edwards v. Tipton*, 77 N. C., 224; *Miller v. Miller*, 89 N. C., 406.

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JOHN McGIBBONEY v. JAMES N. MILLS, EXECUTOR, ETC.

In an action upon a bond, the court, on affidavit that the bond is believed to be a forgery, may, at the appearance term, under the act, Rev. Stat., ch. 31, sec. 86, order the plaintiff to file the instrument, for such time as the court may think proper, in the clerk's office, for the inspection of the defendant and others.

APPEAL from interlocutory order made at GUILFORD Fall Term, 1851, *Ellis, J.*

The case was this: An action of debt was brought by plaintiff against defendant, as executor of David McGibboney, returnable to Guilford Superior Court of Law, at Fall Term, 1851. Plaintiff declared upon a bond, executed by defendant's testator. At the same term defendant craved "oyer," and filed the following affidavit: "James N. Mills, defendant, makes oath that he is advised and believes that the bond, the alleged foundation of this suit, is spurious; that it is, if so, likely the work of the plaintiff, the son of the testator, who was well acquainted with the form and character of his father's handwriting, and that to detect successfully the forgery, if it really is a forgery, it is, he is advised, material and necessary that the bond sued on should be filed, so as to give witnesses, before being examined as to the writing and signature, an opportunity of examining the same." Another affidavit to the same purport was made by a party interested.

Upon these affidavits the court made the following order: "On (164) affidavits filed, it is ordered by the court that the plaintiff file with the clerk of this court, for the inspection of the defendant, the bond sued on, from 1 January, 1852, to 15 January, 1852."

From this order the plaintiff, by leave of the court, appealed.

Kerr for plaintiff.
Gilmer and Miller for defendant.

NASH, J. The order in this case was made under the acts of the General Assembly of 1821 and 1828, Rev. Stat., ch. 30, sec. 86. The action in which it was made was brought upon a bond or alleged bond of the defendant's testator, and defendant filed an affidavit stating that the alleged bond was a forgery, and moved the court for an order upon the plaintiff to file the paper-writing with the clerk of the court, for the inspection of the defendant. The order was made, and from it the plaintiff appealed.

If this case does not come within the statute, we are at a loss to conceive one that does. It gives to the court the power, upon a proper motion, to compel the parties to a suit to produce books or writings in their possession or power and which contain evidence pertinent to the issue, "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery." *Scarborough v. Tunnell*, 41 N. C., 103, is decisive of the power of the court of chancery to make such an order as the one in this case. The bill was filed to set aside a deed under which the defendant claimed the property in dispute, upon the ground of forgery, which was denied by the answer. The Court declares that it has always been the course in this State to order the instrument in such cases to be brought into court for the purpose of inspection. In *Cooper v. Cooper*, 17 N. C., (165) 298, "Clearly," says the Court, "the inspection of the instrument is indispensable to the plaintiff's preparation for the hearing, as it is impossible, without the deed, that he can give evidence as to the handwriting and various other matters tending to show that the instrument is not genuine." Here the defense is that the instrument on which the action is brought is a forgery. How is it possible for the defendant to support his plea, that it is not the deed of his testator, unless he can have free access to it, both for his own inspection and that of his witnesses? Such testimony is pertinent to the issue the jury have to try. This, too, is the course of the English courts of chancery. *Beckford v. Beckford*, 16 Ves., 438.

There is no error in the interlocutory order of the court below.

PER CURIAM. Affirmed.

Cited: Branson v. Fendress, post, 166; *Long v. Oxford*, 104 N. C., 409; *Bank v. McArthur*, 165 N. C., 375; *Mica Co. v. Express Co.*, 182 N. C., 672.

JOHN BRANSON v. JOSEPH H. FENTRESS ET AL.

A court cannot, under the act, Rev. Stat., ch. 36, sec. 86, order the production of papers by the defendant on the application of the plaintiff where no declaration has been filed, so that, in case the papers are not produced, the court can render judgment for the plaintiff, according to the provisions of the act.

APPEAL from *Dick, J.*, at Spring Term, 1851, of RANDOLPH.

Gilmer and Miller for plaintiff. (166)
Mendenhall for defendant.

PEARSON, J. The question presented in this case arises under the act, ch. 31, sec. 86, Rev. Stat., as in *McGibboney v. Mills, ante,* 163. For the reasons set forth in the opinion in that case, it is decided that the application came within the statute, and the defendant was entitled to the order he asked. The only question here is whether this case comes within that statute, and we are of opinion it does not. The action is brought to recover a sum of money due on two bonds. The defendants demanded over, and pleaded the general issue, with other pleas. On the trial the plaintiff was called, and, failing to appear, was nonsuited, a new trial granted, and leave given to amend his declaration. He then filed an affidavit, setting forth that defendants were in possession of the evidences of the debt upon which the action was brought, and moved for an order upon them to produce them on the trial. His Honor refused the order, and plaintiff appealed to this Court. The object of the motion was to enable the plaintiff to amend his declaration, or rather to file a declaration, for he admitted by his nonsuit and motion that he could not get along with his action without it. We should not hesitate to grant him the order, if we thought he presented a case provided for by the act. The statute provides the course to be pursued by the court where either party shall fail, for reasons not satisfactory, to comply with the order. If it be the plaintiff, a judgment of nonsuit shall be rendered; if it be the defendant, a judgment by default. The act, then, only contemplated such a state of the suit as would render, on the part of a plaintiff, a judgment efficacious, such as the court could (167) make, and upon which he might proceed to secure redress without the aid of the papers withheld. What judgment can the court render here? No declaration is filed setting forth what is due and claimed by the plaintiff. This motion is not to give parol evidence of the papers or bonds withheld, upon notice to produce them on the trial, but to be permitted to proceed under the act of 1836. What judgment, then, under that act, could the court render, for what sum, and how is it

to be ascertained? There is nothing in the pleadings to guide them. A court of equity would, no doubt, aid the plaintiff to a discovery (*Thung v. Edgar*, 1 Con. Eng. Ch., 456); but, sitting in a court of law, we have no such power except under the act of 1836. It is true, that act provides that the court of law, where the case is pending, shall have power to make an order for the production of books and other writings, "in cases and under circumstances where they (the parties) might be compelled to produce the same by the ordinary rules of chancery"; and there can be, I presume, little doubt but what a court of chancery, as before mentioned, has the power in a case like this to order a discovery. And if the act had stopped here, we certainly would consider the application now made to be within its operation. But it has not so stopped, but gone on to say, in substance, in what cases the court of law can act under it, namely, in cases so situated that the court, in applying it, can efficaciously act in favor of the party moving. Here, in our opinion, the Court cannot so act, and this case is not within the statute.

PER CURIAM. Affirmed.

Cited: Justice v. Bank, 83 N. C., 11; *McLeod v. Bullard*, 84 N. C., 525.

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(168)

LUCRETIA SPARKMAN v. WILLIAM G. DAUGHTRY ET AL.

1. When it appears from the record that a cause was tried at a special term of a Superior Court, it is to be presumed *prima facie* that an order for holding it was duly made, and that it was duly held.

2. A Superior Court at a special term has the same power to remove a cause to another county that it has at a regular term.

APPEAL from *Settle, J.*, at the Special Term in June, 1851, of BERTIE.

The facts of the case are sufficiently stated in the opinion delivered in this Court.

W. N. H. Smith, Thos. Bragg, and R. R. Heath for plaintiff.
Asa Biggs and B. F. Moore for defendants.

NASH, J. The action is brought to recover the value of a slave named Jacob, the property of the plaintiff, who was drowned at the fishery of the defendants. Defendants were the owners of the fishery and hired Jacob of the plaintiff as a boatman to work there. On an attempt to

put out the seine, the boat in which Jacob was, was upset, and he drowned. Much conflicting testimony was given, both as to the state of the weather at the time the attempt was made to carry out the seine, being a very dark and stormy night, and on the propriety of doing so at that time.

His Honor, after stating to the jury the principles of law governing the action as against the defendants, left the case upon the facts to them, instructing them, in substance, if they believed the witnesses for the plaintiff, they should return a verdict for her, but if they believed those of the defendants, they ought to find for them. A verdict and judgment were rendered for the plaintiff, and the defendants appealed.

No error is assigned to the charge; it was as favorable to the (169) defendants as it could be, and if any error was committed, it was not one of which they had any right to complain.

Upon the argument here, it was not denied that the doctrine of *respondeat superior* applied to the defendants. But it was contended that the Superior Court of Bertie, where the cause was tried, had no jurisdiction of the cause. This objection, it was alleged, was apparent upon the record, and if so, the defendants are entitled to the benefit of it. The objection was urged on two grounds, *first*, that it did not sufficiently appear that any special term of Gates Superior Court was held according to law, and, *secondly*, that if so held, it had no power to remove the cause to the Superior Court of Bertie. To sustain the first objection, two reasons were assigned: *first*, that the record does not show any order for holding the special term, nor does it show, if so ordered, that it was held by any judge of the Superior Court. The cause was pending in the Superior Court of Gates at the regular term thereof, in the spring of 1851. The record then proceeds as follows, "and afterwards, at Spring Term, 1851, the cause was continued," and afterwards, at June Special Term, 1851, "this cause, on affidavit of the defendants, was removed to Bertie Superior Court." It does, then, appear from the record that a special term of Gates Superior Court was held, and we are bound, *prima facie*, to presume not only that an order for its being holden was duly made, but that it was duly held. The whole ground occupied by the objection we are considering is covered by *S. v. Ledford*, 28 N. C., 5. In that case the defendant was convicted of perjury (170) at a special term of the Superior Court of Yancey. After the conviction a motion was made in arrest of judgment, because the indictment did not set forth an order of the court, at the preceding regular term, for the special term, nor charge that the judge who held the court was duly appointed by the Governor to hold it. These objections were

overruled, and the court decided that the act authorizing special terms of the Superior Court does not create a new court. It is still the Superior Court of Law, held by a judge of the Superior Courts; and as a Superior Court, the regularity of its proceedings in point of time as *in other things* is to be presumed until the contrary appears. "Inasmuch as the special term might be lawfully held, the fact that it was lawfully held on a particular day and at the proper place establishes, at least *prima facie*, that it was the due and proper time to hold it." Nor was it necessary that the appointment of the judge to hold the court should be spread upon the record. He does not claim his powers, as a judge of the Superior Courts, from the appointment of the Governor, but from his election and commission as a judge of the Superior Courts. The appointment by the Governor is, under the act of 1844, ch. 16, nothing but a mode by which the judge is assigned to hold the special term of the court. We are bound, then, to presume, *prima facie*, that the special term of Gates Superior Court was regularly ordered and duly held, until the contrary appears.

The second objection is that if the special term of Gates Superior Court was properly held, its power extended only to the trial of causes, and not to their removal. In the first section of the act of 1844, ch. 16, providing for the ordering of special terms of the Superior Courts, it is provided, "and all the causes on the civil docket shall be tried under the same rules and regulations as are now provided for the holding
(171) the regular terms of said court." A judge presiding at a regular term has power to remove any civil suit for trial to an adjoining county, upon proper cause shown, of which he is the exclusive judge, and by section 5 of the act of 1844 the judge holding the special term is clothed with all the power to hear and determine the causes on the docket that he would have if presiding at a regular term. He must necessarily have power to make all orders and rules necessary to prepare a cause for trial and to expedite its progress. If this were not so, he could make no order to continue a cause or to take a deposition. To remove a cause for trial is among his legitimate powers. But in this case the cause was removed upon the affidavit of the defendants, and they appeared at Bertie Superior Court and defended the action. It is true that the consent of the defendants could not give the court jurisdiction of the cause, but it had it under the law of the country, and it was exercised at their request, and it does not lie with them to allege this objection. In the language of the Court in *S. v. Seaborn*, 15 N. C., 315, "It would be mischievous to allow the party an exception against his own motion."

It is further urged that as soon as the special term closed, all the cases remaining on the docket untried returned to the regular term. This is

true, but immediately upon the termination of the special term in this case this cause ceased to be on the docket; it was transferred to the Superior Court of Bertie.

PER CURIAM. The motion in arrest of judgment overruled, and judgment below affirmed.

Cited: S. v. Baker, 63 N. C., 279.

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(172)

WILLIAM B. MARCH v. JOHN W. LECKIE.

1. In an action of detinue, a declaration for "*a set of turner's tools*" is too indefinite, and cannot be supported.

2. But if there be added the words, "being the same formerly owned by one Burkett," the description becomes sufficiently specific and capable of being identified.

APPEAL from *Battle, J.,* at Spring Term, 1851, of ROWAN.

The question submitted in this case is sufficiently stated in the opinion delivered in this Court.

No counsel for plaintiff nor defendant.

NASH, J. This is an action of detinue for a set of turner's tools. Both parties claimed under one Epperson. The bill of sale to the plaintiff was assailed by the defendant upon the ground that it was obtained by duress. His Honor's charge upon this point has not been complained of in the argument here, and it certainly was correct. The defense before us has been placed upon an objection appearing on the face of the record. It is that the articles sued for are not sufficiently set forth in the writ. The court charged that all the witnesses spoke of them as the tools once owned by Burkett and then in defendant's possession, and that they were sufficiently identified by the proofs. A verdict and judgment were rendered for the plaintiff, and defendant appealed.

If the case rested on the description of the tools in the writ, we (173) should be at a loss how to decide the question; but we are relieved from that difficulty by the declaration, which sufficiently supplies any deficiency that may exist in it. In that the tools are described, as stated in the evidence, "as the tools formerly owned by one Burkett." In the action of detinue more certainty is required in setting forth the property demanded than in an action of trover, for the reason that, in the latter action, the plaintiff recovers not the thing converted, but damages for

the conversion; whereas the object in the former is to recover the thing itself. It is necessary, therefore, that the thing detained should be capable of being specifically identified or clearly distinguishable from the other property. Hence it will not lie simply for money, though the amount be specified, nor for so much corn, because, under such descriptions, these things have no mark or quality whereby they can be distinguished or known from any other money or corn, whereby the sheriff may be guided in delivering them to the plaintiff. But if the money or corn is described as set apart by itself, so as to be identified as the particular article sued for, as being in a box or bag, detinue will lie. Coke Lit., 286; *Banks v. Whitshorn*, Croke Eliz., 467. Their being in a box or bag is a sufficient description, without any description of the box or bag; their being in such position, set apart from like articles, will carry with it the requisite certainty. So detinue will lie for deeds or other writings if the plaintiff can describe them, though the date be not mentioned. Buller N. P., 50; Bacon Abr., title, Detinue. It is not necessary, therefore, that the articles sued for should be minutely described in every particular, but they must be capable of such a description as will identify them and point them out as the identical articles
(174) sued for. In this case the declaration, which is according to the testimony, describes the tools as being the same "formerly owned by one Burkett." This description we think sufficient to distinguish them from any other set of turner's tools in the possession of the defendant as much as saying they were in a box, without describing the box.

We see no error in the judge's charge or deficiency in the record.

PER CURIAM. No error.

HENRY ARNOLD, EXECUTOR, ETC., v. ELIZA ARNOLD.

1. An executor's right to the personal property of his testator commences at the death of the testator, and from that time the statute of limitations begins to run against him.

2. When a party claims a title in himself under a conveyance from one *non compos mentis*, and has possession under such alleged title, he does not hold as bailee, but, although the original owner is not barred by such adverse possession on account of his incapacity, yet when his incapacity is removed or he dies, leaving an executor, the statute will begin to run.

(175) APPEAL from *Ellis, J.*, at Special Term, 1851, of MOORE.

Detinue for a slave named Sukey, and the pleas are *non detinet* and the statute of limitations. Upon the trial the facts were these: Solo-

mon Arnold was owner of the slave, and on 27 July, 1842, he made a deed of gift of her to his son, Howell Arnold, with a reservation for the life of Mary Arnold, the wife of Solomon, which deed was duly attested, proved, and registered in August, 1842. Howell Arnold died in November, 1843, without having the slave in his possession, but she was held by Solomon until his death, which happened in October, 1844, and then the present defendant, who is the widow of Howell, immediately took the slave into her possession and hath held her ever since, claiming her as her own. Solomon Arnold left a will, made 12 March, 1838, in which he appointed his three sons, William S., Henry, and Howell, executors; and it was proved in January, 1847, and Henry Arnold, the plaintiff in this suit, then qualified alone as executor. In the will the testator bequeathed the slave, Sukey, to his wife, Mary, for her life, and afterwards to his two sons, William S. and Howell; and the said Mary died in April, 1846. In August, 1847, the plaintiff demanded the slave from the defendant, but she refused to give her up, and claimed the property in her; and in January, 1848, this action was brought. On the part of the plaintiff evidence was given that at the time Solomon Arnold made the deed of gift to his son he was of unsound mind and had not capacity to make a contract; and on the other side evidence was given that the donor was then of sound mind and had capacity to make the deed. The court instructed the jury, amongst other things, that, supposing Solomon Arnold not to have had capacity to make the deed of gift, and that it was for that reason not effectual to pass the title of the slave to his son, Howell, then the plaintiff was entitled to recover, notwithstanding the defendant had the adverse possession of the slave from (176) October, 1844, claiming and using her as her own, for the reason that the plaintiff's action and right to the slave were not bound by such possession, because the plaintiff did not qualify as executor until January, 1847, and brought his suit within one year thereafter. The jury found for the plaintiff, and the defendant appealed from the judgment.

Strange, Mendenhall, and Kelly for plaintiff.
D. Reed and W. Winslow for defendant.

RUFFIN, C. J. The principle of the instruction is that an executor gets no property in his testator's goods, and cannot take them nor sue for them, before getting letters testamentary. But the Court understands the law to be settled to the contrary. Although in a case of intestacy a person, though entitled to the administration, cannot intermeddle in the goods before taking administration, except for special purposes allowed by statute, yet the writers on the law of executors agree in stating that an executor may, immediately upon the death of the

testator, take possession of his effects and bring suit, though he cannot declare before probate, for the technical reason that he must make *proffert* of his letters. And that position is sustained by ancient and undisputed judicial opinions. In *Graysbrook v. Fox*, 1 Plow., 280, Dyer cites a case in which an executor before probate commanded A. to take certain goods of the testator out of the possession of B., and afterwards the executor was allowed to refuse to administer, and administration was granted to B.; and he then brought trespass against A. for the taking, and it was held that the justification by the command of the executor was good. And he lays it down as clear law that executors are not called executors in respect only that they actually execute,
(177) but in respect that they may execute; for the death of the testator makes the testament, and by his death the property of the goods which was in him is cast upon and vested in the executor, who may, therefore, before probate, take the goods and dispose of them; and he says further that, for that reason, if any one take the goods before the executor seizes them, he shall have trespass or replevin against him before probate. In *Wankford v. Wankford*, 1 Salk., 381, *Lord Holt* repeated the same doctrine, that, before probate, an executor may seize the goods. As the plaintiff then might, as the owner of the slave, have had redress by taking her at any time after the death of the father, or by bringing suit for her, the adverse possession of the defendant for more than three years after the plaintiff's right accrued and action arose bars him. An argument might perhaps have been made against the truth of this position in our law, founded on the prohibition in the act of 1715, ch. 10, sec. 4, under a penalty of £50, of any person entering upon the administration of any deceased person's estate until obtaining administration or letters testamentary. But whatever influence that provision might once have had, it cannot have now, because in the revision of 1836 the Legislature, seeing the frequent convenience and indeed the occasional necessity for the executor's doing some things before there was time to prove the will, modified the provision by confining it to the administration of an intestate's estate before obtaining letters of administration. Rev. Stat., ch. 46, sec. 8. It is true, also, that it is held with us that where two or more executors are appointed, those only who qualify need join in an action as plaintiffs. But that does not affect the rights of all the executors until one shall prove the will; and when he does so, then, of course, he is executor by relation from the beginning, to the exclusion of the others until they also qualify. So there was no incapacity in the plaintiff to assert his title to the slave, and, consequently, he is now barred.

But it was further contended at the bar that the defendant's
(178) possession was not adverse, but that, upon the hypothesis in the

instruction of the donor's incapacity, which the verdict affirms, the deed was void, and the defendant held as bailee, as if the gift had been oral from the parent to the child. Where an oral gift of a slave is made to a child it may or may not, according to an express provision of the act of 1806, be an advancement at the election of the parent at any time during his life, and, therefore, of necessity, the relation between them during that period is that of bailor and bailee, unless it be terminated by a demand and refusal, in which last case the possession of the donee becomes adverse; that is, he does not thenceforward hold for the donor upon his title, but for himself, upon a claim of title in himself. But when one—whether a child or a stranger—takes possession of goods under a conveyance which is proper in form to pass the title absolutely, it is clear that his possession is not subsidiary to a title, real or supposed, in the maker of the conveyance, but purports to be the exclusive possession of the party himself, as the owner, and, consequently, it is adverse to the former owner as to the rest of the world. It is true, the *non compos* donor or vendor is not barred by such a possession. But that is not because of the character of the possession, but of the party's incapacity; for, admitting the possession to be adverse, the operation of the statute of limitations is suspended while the incapacity exists. In fact, however, it is on a claim of right, and it is adverse, and, therefore, upon the *non compos* becoming of sound memory or upon his death, leaving an executor, the time begins to run, and an action must be brought within the limited time from that event. If it were not so there would be no bar from any length of time when a vendor, though without the knowledge of the vendee, happened to be under mental infirmity (179) at the making of the contract.

PER CURIAM. *Venire de novo.*

Cited: Johnson v. Arnold, 47 N. C., 115.

LEMUEL SAWYER v. WILLIAM JARVIS.

In trespass for false imprisonment, the plaintiff proved that, under a claim of right, he entered a field cultivated and occupied by one of the defendants and gathered and took away corn there growing, whereupon he was arrested for petit larceny, by the defendants, and committed to jail. The defendants then offered to prove that the plaintiff's land had been sold by the sheriff under an execution against the plaintiff himself. This evidence was offered in mitigation of damages and rejected by the court below: *Held,* that under these circumstances the evidence should have been received.

SAWYER *v.* JARVIS.

APPEAL from *Settle, J.*, at Fall Term, 1851, of CAMDEN.

Trespass for assault and battery and for false imprisonment. Pleas, not guilty; justification; statute of limitations.

(180) On the part of the plaintiff it was proved that in the Fall Term of 1850 he was arrested by the defendant Humphries at the instance of the defendant Jarvis, carried before the defendant Ferebee, a magistrate of the county, and thence carried by the said Humphries, under the order of the said Ferebee, and committed to the prison of the county. Plaintiff also gave evidence of acts and declarations of defendant Jarvis at and about the time of the arrest, tending to show malice in him, and previous to the arrest.

Defendants exhibited a paper-writing, purporting to be a State warrant against the plaintiff, signed by a justice of the peace of the county, and proved that the same was in the hands of the defendant Humphries at the time of his making the arrest, and that he, Humphries, was an acting constable of the county. This paper was not offered in evidence for the purpose of justifying, but in mitigation of damages only, and is, therefore, not deemed necessary to be made part of the case.

In further mitigation of damages the defendants showed that in 1850 the defendant Jarvis was in possession of a tract of land in said county, claiming title thereto, and raised upon it a crop of corn; that after the corn was matured the plaintiff and three other persons entered the field in the daytime and were there found by the defendant Jarvis gathering and carrying away the corn, and he thereupon caused the plaintiff to be arrested under the warrant aforesaid.

Plaintiff then proved that he entered the field under a claim of title and with the advice of counsel, and that soon after Jarvis had taken possession he told him he need not cultivate the land, for he, the plaintiff, would reap the benefits. Defendants then proposed, in further

(181) mitigation of damages and to rebut malice and to show that Jarvis only desired to protect his property, to prove title in him (Jarvis) by showing a judgment against the plaintiff, an execution, a sale, and the sheriff's deed to him for the premises. This evidence the court declined to receive.

His Honor instructed the jury, at the request of plaintiff's counsel, to return a verdict of not guilty as to the defendants Ferebee and Humphries; and as to the defendant Jarvis, the court instructed the jury that the sole inquiry for them was as to the amount of damages, and that, in estimating them, they could take into consideration the provocation which the defendant Jarvis had received in having his corn taken away from him in the manner described. The jury rendered a verdict in favor of the defendants Humphries and Ferebee and against the defendant Jarvis, upon the issues. Defendant Jarvis moved for a rule on the

plaintiff to show cause why a new trial should not be granted for error in rejecting the evidence offered, which was granted, and on argument discharged. Judgment for plaintiff. Appeal prayed by defendant Jarvis, and granted.

Smith and Jordan for plaintiff.
Ehringhaus for defendant.

PEARSON, J. In an action of this kind juries are allowed a discretion on the subject of damages, so as not merely to give a compensation for the injury actually sustained by the plaintiff, but to go farther and increase the damages, when there are circumstances of aggravation, as a punishment to the defendant by way of "vindictive" or "exemplary damages."

When the court is called on to impose a discretionary fine, (182) there is a greater latitude as to receiving evidence than is admissible in reference to the trial of the issues in the cause before the jury, for the reason that as the fine is a matter of discretion, it is proper that the court should be put in possession of all the circumstances that should regulate it. The same reason would seem to apply to a case where, supposing the jury to find all "the issues in favor of the plaintiff," they are expected to give damages by way of punishment to make an example of the defendant. In this case, for the purpose of mitigating the damages, the defendant proved that he was in possession of a field and had raised a crop of corn, and finding the plaintiff in the field gathering and carrying away his corn, he caused him to be arrested, we presume upon a charge of larceny, although the case does not so state. The proceeding was irregular and void, and this action is for the false imprisonment. To aggravate the damages the plaintiff was then allowed to prove that he had entered the field under a claim of title and with the advice of counsel; and that, soon after the defendant took possession of the land, the plaintiff told him he need not cultivate it, for he, the plaintiff, would reap the benefit. In reply, the defendant offered to show a judgment, execution, and sheriff's deed, under which the land was sold as the property of the plaintiff, and had been purchased by the defendant. This was objected to, and the court refused to admit it.

It is certain that great inconvenience would be the result if in trying *the issue* in a case like the present evidence was admissible involving the question of title; but in regard to the damages, the title would have had an important influence with the jury, and under the very peculiar cir-

cumstances we can see no reason for excluding the evidence. The question would be received by the jury in one of two ways:

(183) The plaintiff under a claim of right, and by the advice of a lawyer, entered the field and began to pull corn for the purpose of asserting his title; thereupon the defendant, instead of bringing an action of trespass, takes out a State's warrant and has the plaintiff put in jail. This conduct on the part of the defendant was "high-handed and malicious, and he should be made an example of."

The defendant was in possession of the field, and had made a crop of corn; thereupon the plaintiff enters and begins to pull the corn. His claim of right is all a pretext; no lawyer ever advised him to pull that corn. For the defendant had purchased this very land at sheriff's sale, *"when it was sold as the property of the plaintiff, and the defendant has the sheriff's deed for it."* The fact that, when the defendant took possession in the spring and commenced his crop, the plaintiff "made his threat" that "he would reap the benefit," shows that he is a *lawless man*: and we think it was well enough that he was put in jail for a while.

Looking at *"this side,"* the jury assessed $500 damages; looking at *"that side,"* they would probably have assessed sixpence; and the question is, Does the inconvenience which may result from the admission of *evidence of title* in an action like this confine it to the question of damages, and confining it to a reply to evidence offered by the plaintiff in aggravation, justify the exclusion of evidence from which the jury would be able to look *at both sides of the case?*

We think the evidence, under the peculiar circumstances, ought to have been received.

PER CURIAM. *Venire de novo.*

(184)

STATE v. ELIJAH ARNOLD.

1. To an exception for the rejection of evidence, it is a sufficient answer that it was irrelevant.

2. Where evidence offered is irrelevant in law and *calculated to mislead or prejudice the minds of the jury*, it would be error in the court to receive it.

3. In the trial of an indictment for murder, when the dying declaration of the deceased is that "A. B. has shot me, or has killed me," the court must presume, *prima facie*, that the deceased intended to state a fact of which he had knowledge, and not merely to express an opinion. The jury must judge of the weight of this, as of other evidence, by the accompanying circumstances. If he merely meant to express his opinion or suspicion, as an inference from the other facts, the jury should disregard it as evidence in itself.

4. When the defense on an indictment for murder is that the prisoner was under the age of presumed capacity, the *onus* of proof lies upon the

prisoner. If the age can be ascertained by inspection, the court and jury must decide.

5. On the trial of an indictment for murder the affidavit of the deceased, though not taken according to the act of 1715, is competent and proper evidence as a dying declaration.

APPEAL from *Battle, J.*, at Fall Term, 1851, of COLUMBUS.

This is an indictment for the murder of Simon Dyson. The prisoner appeared at his trial, in October, 1850, to be a small boy, but his age was not stated. Evidence was given on the part of the State that, within a week or two before the homicide, the prisoner had several times expressed ill-will towards the deceased, and threatened to kill him. One Matilda Merritt then deposed that the prisoner's father lived 300 or 400 yards from the house in which she resided, which was on (185) land belonging to the deceased, and about half a mile from the residence of the deceased; that on 15 May, 1850, the prisoner came to her house when the sun was about an hour high, in the evening, having his gun with him, and that a little before dark there came up a heavy shower of rain, and the deceased came in the house to get out of it, saying he had been out hunting hogs; that the prisoner refused to come into the house after the deceased entered, although the rain had commenced, but, after solicitations from her, he did come in, and he and the deceased soon got to cross questions—the latter alleging several charges against the prisoner about his way of life, some of which the prisoner denied, but admitted others. After some time they appeared to be reconciled, and the prisoner laid down on a table and seemed to be sleeping; but about 10 o'clock at night he got up and, though requested by her to go to bed and stay all night, he said he would go home, and took his gun and went out, but soon called from the yard for a light, in order, as he said, to catch a mole he had found. The witness then handed him a lightwood torch at the door, and he took it and appeared to be searching on the ground; but in a few minutes he put out the torch and bade them goodnight and, as the witness then thought, went home. There was at the time a bright fire in the room, and the door opening into the yard was about one-fourth open, and the deceased was lying on the floor with his feet toward the opening of the door, and about 5 feet from it. The witness was then asked, on the part of the State, whether she and the deceased immediately entered into conversation about the prisoner, and counsel for the prisoner objected to the question being answered; but the court permitted her to answer that they did; and then, on the part of the prisoner, the witness was required to state the conversation particularly, and she said the deceased censured the prisoner's way of life and spoke very disparagingly of him. She further deposed (186)

that while she and the deceased were engaged in the conversation, the deceased remarked to her that the prisoner "was eavesdropping, and heard what they were saying"; and that she replied that could not be so, for he had gone home; and the deceased said, "No, he is not gone"; and in one or two minutes afterwards, which was about ten minutes after the prisoner had told them goodnight, a gun was fired and the deceased shot, and at the moment the deceased exclaimed, "Great God! Elijah Arnold has killed me. Bring me some water, for I am a dead man!" Counsel for the prisoner objected to the admissibility of the deceased's exclamation, but the objection was overruled. There was further evidence that the shot struck the privy members of the deceased, and ranged upward into the body, cutting the intestines in several places, and a physician who attended the deceased gave it as his opinion that the shooting caused the death of the deceased, and, from the appearance of the wounds, that the person who fired the gun could not have been more than ten and perhaps not more than five steps from the deceased. The deceased lived until night of the next day; and evidence was given that he suffered great pain, but was all the while in his right mind, and repeatedly declared to the physician and others that the prisoner, and no other person, shot him; and he also made an affidavit in writing before two magistrates that Elijah Arnold shot him. He did not say on those occasions that he saw the prisoner shoot, or that he did not see him, but simply stated the fact that the prisoner, and no other person, shot him. The prisoner's counsel objected to receiving the declarations and affidavit, but there being satisfactory proof that the deceased constantly declared, from the time he was shot until he died, that he believed he should die, they were admitted as dying declarations.

(187) Counsel for the prisoner alleged that he was apparently under the age of 14 years, and, therefore, that it was incumbent on the State to prove that he was over that age, or, if under it, that he had such knowledge of right and wrong as would render him responsible for the homicide, if he committed the act. The court held the *onus* of proof to lie on the prisoner as to his age. The prisoner was convicted, and from the judgment on the conviction appealed to this Court.

Attorney-General for the State.
Troy, with whom was McDougall, for the prisoner.

(189) RUFFIN, C. J. The Court is of opinion that neither of the objections to the evidence is valid. As to the first, it is to be observed that the details of the conversation between the deceased and Merritt were brought out by the prisoner — the State proving only that they talked about the prisoner. The most that can be said against that

is that it was irrelevant. The court is not obliged to waste time and protract trials by admitting irrelevant evidence, and to an exception for the rejection of evidence it is a sufficient answer that it was irrelevant. But an exception to the admission of evidence on the ground of irrelevancy is, as a general thing, refuted on its face, since what is immaterial cannot be supposed to hurt. It is not necessary to say that a case cannot arise in which evidence really irrelevant in point of law may be calculated to mislead or prejudice the minds of the jury; and in such a case its reception would be erroneous. But, clearly, proof of the fact simply that those persons talked about the prisoner could have no such effect, and, if erroneous, would be no ground for reversing the judgment. The Court, however, is of opinion that the whole conversation was proper evidence for the State. There was such a probability that the prisoner was in the yard and within hearing that the court ought to submit it to the jury as being *prima facie* in his presence, and calculated to call forth vengeance, unless the jury think, under the circumstances or from other proof, that the prisoner was not in hearing, in which case they should be told not to allow any weight to the evidence.

The exclamation of the deceased at the moment he was shot was competent on several grounds. One is that above mentioned, that the prisoner was probably within hearing. Another is that it was so immediately connected with the principal fact of the shooting as to be material to a proper comprehension of the fact, and was a part (190) of the *res gestæ*. And a third is, that the wounded man seems to have been instantly and fully convinced that he must speedily die from the wound, so as to render this a most impressive dying declaration, because it was uttered before he could have made up an account, not founded on fact, but the result of ill-will or evil surmises against the prisoner.

The next objection is to receiving any part of the declarations of the deceased as his dying declarations. Several grounds were taken in the argument. It was principally insisted that they do not purport to state the fact, but only the opinion of the deceased, that the prisoner shot him; and also that it did not appear from the declarations or from the situation of the parties at the time that the deceased had the opportunity of knowing the fact, so as to enable him to express more than an opinion on the point. But, undoubtedly, the words do import that the deceased was professing to state the very fact. His language is affirmative throughout: "Elijah Arnold has killed me: He, and no other person, has shot me." And, although the exception states that the deceased did not in so many words say that he saw the prisoner shoot, yet it sets out further that the deceased, in his various declarations, always stated the

fact that the prisoner shot him. It must, therefore, be understood, *prima facie*, if not conclusively, that the deceased intended to affirm as a fact that the prisoner shot him, and of course that he affirmed it upon his knowledge of it. The other branch of the objection, that it did not appear that the deceased could know the fact, and, therefore, that his declarations may have been matter of inference and opinion, seems rather to go to the credit to be given by the jury to the declarations than to their competency. As they purport in themselves to declare
(191) the fact, the court was bound to submit them to the jury, although the deceased did not go into the detail of his means of knowledge. If in passing on their weight the same facts on which their competency depended with the court be material to their credibility, the jury must of necessity take them, as well as others, into their consideration for that purpose. It might, therefore, have been a proper subject of observation to the jury that, although the deceased professed to state the fact, he did not expressly say that he saw the prisoner shoot nor how he knew the prisoner to be the person. They might have concluded, from the darkness of the night, the relative positions of the door and fireplace, the degree to which the door was open, the previous misunderstanding between the parties, and other like things, that the deceased did or did not declare the fact upon his own knowledge, but upon suspicion and inference; and if the latter, they would, of course, give no weight to the declarations. But it is not seen how the court could reject an affirmative declaration of a particular fact upon a suspicion of some defect in the party's means of knowledge, because he omitted to state them minutely. In this case, indeed, the circumstances connected with the language of the deceased are strong to show that he had the means of knowing the fact, and that he knew what he affirmed.

The person who fired the gun must have stood in front of the door and very near it, and the deceased was lying within 5 feet of the door with his feet and face towards it, and with a bright firelight thrown on the floor, so that either by the reflection of the light or by the flash of the gun the deceased may, and, it would seem, must have seen the person when he fired. Hence the instantaneous exclamation that the prisoner had killed him—an assertion which the deceased could not have honestly made, and in his condition would not have made,
(192) touching the matter of fact, if he inferred it merely as matter of conjecture. But a further and decisive answer to the objection is that it does not appear to have been taken on the trial. As the exception is understood, the objection at the trial was that the declarations were not competent on the ground that it did not appear they were made under the apprehension of impending death, for immediately after stat-

ing the objection of the prisoner's counsel, the exception proceeds to state, as the reason of the court for overruling it, that the court was satisfied from the evidence that the party made them under the belief that he was dying; from which the inference is that the objection was founded on that reason alone. Consequently, the facts are not stated with reference to any other point, and the decision here ought not to be on any other. *Woodcock's case*, 1 Leach, 500, is a direct authority that the affidavit of the deceased, though not taken according to the act of 1715, is competent and proper as being in itself a dying declaration.

On the last point the Court is also of opinion that there was no error. The objection assumed as a fact that the prisoner appeared to be under 14 years of age. As there was no proof on the point, it could only be judged of by inspection, and so far as that goes it must be taken to have been decided against the prisoner both by the court and the jury. As the subject of direct proof, the *onus* was certainly on the prisoner, as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved.

PER CURIAM. No error.

Cited: Holmesby v. Hogue, 47 N. C., 393; *S. v. Williams*, 67 N. C., 17; *S. c.*, 68 N. C., 61; *S. v. Gailor*, 71 N. C., 92; *Jones v. Call*, 93 N. C., 179; *S. v. McNair, ibid.* 633; *Deming v. Gainey*, 95 N. C., 532; *S. v. Craine*, 120 N. C., 602; *S. v. Keever*, 177 N. C., 116.

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(193)

GUILFORD LEWIS v. JONES COOK, EXECUTOR, ETC.

1. A covenant of warranty, annexed to an estate in land, determines with the estate to which it is annexed. But when one takes a conveyance in fee, with covenant of warranty from a husband and his wife, and the title of the wife does not pass in consequence of the want of her privy examination, yet the bargainee takes an estate in fee as to all the world except the wife and those claiming under her, not barred by the statute of limitations.

2. An estate is *determined* only when it *expires by its own limitation;* and when the limitation is in fee, the covenants of warranty run with it, and may be sued on by the bargainee and his assignees when they are evicted by a title paramount.

3. When a man purchases at a sheriff's sale under execution the estate which another professes to have in fee to certain lands, to which covenants in warranty are annexed, he acquires, as incident to the estate, the right to those covenants.

4. Where covenants of warranty which run with the land are contained in a conveyance, purporting to be in fee, the tenant in fee in possession cannot, by any assignment, sever the covenants so as to make them independent of the estate. They are incidents and cannot be disannexed from their principal.

APPEAL from *Ellis, J.*, at Spring Term, 1851, of FRANKLIN.

The case is stated in the opinion delivered in this Court.

Saunders and Moore for plaintiff.

W. H. Haywood for defendant.

(194) PEARSON, J. This is an action of covenant, on a warranty in the deed of one Harrison, the testator of the defendant. One Jones and his wife, being seized in fee, in right of the wife, and having had issue, executed a deed of bargain and sale, purporting to convey the land to Harrison in fee. The privy examination of the wife was not in due form. Afterwards Harrison, of whom the defendant is the executor, executed a deed of bargain and sale, purporting to convey the land to one Howerton in fee, with a *covenant of general warranty*, which is the covenant now sued on; this deed was dated in 1828, and under it Howerton entered and continued in possession until 1842. In *April*, 1842, Howerton executed a deed of bargain and sale, purporting to convey the land to one Green in fee, with a clause assigning and conveying to the said Green and his heirs "*all the covenants* in the deed of Harrison *warranting the title of said land*, and all other covenants in said deed contained, with full power to sue for any breach thereof in my name, but at his own costs and for his own use."

In September, 1842, the sheriff sold the land under execution against Howerton, tested March, 1842, and the plaintiff was the purchaser, and took from the sheriff a deed conveying to him and his heirs "all the estates, interest, and claim" of the said Howerton. Under this deed the plaintiff entered and continued in possession until after the death of Jones, when he was evicted by the heirs at law of Mrs. Jones, on account of the defect in the title, by reason of the informality in the privy examination. Thereupon he brought this action. The case states "that at the time of the sheriff's sale the plaintiff had notice of the deed to Green, and it had then become notorious, and the plaintiff had notice that Howerton's estate was only an estate for the life of Jones by reason of the defect in the title."

His Honor being of opinion that the plaintiff could not support the action, he submitted to a nonsuit and appealed. In this there is error. *Mr. Haywood* laid down the position that a warranty, being a cove-

nant annexed to an estate, could not continue longer than the (195) estate, and, consequently, that when the estate of the plaintiff was put an end to by the heirs of Mrs. Jones, at the death of Jones, the warranty was gone. We admit the position that the warranty is gone whenever the estate to which it is annexed *determines;* for it is a mere incident of the estate, and the incident cannot continue longer than the principal; as if there be an estate to A. for life, with warranty to him and his heirs and assigns, at the death of A. his estate determines, and the warranty is at an end. This case is put by Lord Coke, and the principle is contained in all the books. The error of *Mr. Haywood* is in reference to the meaning and application of the principle. When does an estate determine? When it is "spent"—expires by *"the terms of its own limitation."* If there is an eviction by title paramount, the estate is in one sense at an end, but has not *determined* so as to deprive the party of the benefit of his warranty, for if so, a warranty would never be of any force or effect until the eviction; the party has no use for it, and after that it is gone. This proposition certainly cannot be maintained.

It is not true that Howerton had only an estate for the life of Jones; he was seized of an estate *in fee.*

"The term of its limitation" was to him, *"his heirs* and *assigns";* and, notwithstanding the fact that it had an "infirmity," and might be put an end to by reason of a defect in the title, still it was a fee simple. It was good until the death of Jones, and then it was only wrongful as to the heirs of Mrs. Jones. As to the rest of the world it was a good fee-simple estate. Suppose Howerton had died seized; could there be a question that his wife would have been entitled to dower? Her estate, like that of her husband's, would be good against every (196) one except the heirs of Mrs. Jones. Or suppose Howerton had continued in possession for more than seven years after the death of Jones, can there be a question that he would not then have held a good estate in fee? This is not consistent with his having an estate only for the life of Jones. The truth is (possibly his Honor fell into error by not adverting to it), Jones purported to convey a fee to Harrison, and he purported to convey a fee to Howerton, and for the purpose of propping and fortifying this fee-simple estate he binds himself and his heirs in a covenant to Howerton, "his heirs and assigns," which is annexed to the estate, and *"runs with it" for its protection* against an eviction by title paramount.

Again, *Mr. Haywood* insists the plaintiff, as purchaser at the sheriff's sale, acquired only an estate for the life of Jones; consequently he did not get the warranty, for that was not *the estate* to which it was annexed. This is not an open question. The sheriff is empowered by statute to

sell all the estates, interest and claim which the debtor himself could sell. Howerton, by his deed passing the estate, would have passed the warranty as an incident, and we think it clear the deed of the sheriff had the same effect. In *Markland v. Crump*, 18 N. C., 94, this point was directly presented, and is taken for granted. There is no question that the land of debtors, when sold under execution, and when it is known or suspected that there is a defect in the title, commands a fairer price, because it is understood that the purchaser acquires all covenants running with and protecting the estate. If the purchaser does not acquire the covenant, what becomes of it?

In the third place it was argued: The deed from Howerton to Green not only professed to pass the estate, but *expressly* passed the covenant of warranty, and although it was overreached in regard to the *estate* by the sheriff's sale and deed, yet it was insisted this could not (197) affect the assignment of the covenant, and Green thereby acquired the beneficial interest then, and has the right to sue on it in the name of Howerton. This cannot be so. The incident cannot be passed without the principal. If the principal does not pass, how can the incident pass? They are inseparable. Can the substance pass without the shadow, or the shadow without the substance? There is no authority or reason to support the proposition that a covenant, annexed to an estate and running with it, can be severed and assigned, so as to be passed by itself or retained by itself, and thereby give an independent cause of action. To show the absurdity of the idea, take this very case. The plaintiff, under the deed of the sheriff, goes into possession, and is evicted by title paramount; he has a cause of action, but the argument is he has no covenant to sue on; and Green has a covenant, but no cause of action, for he has not been evicted. So the covenanter escapes from his obligation, and cannot be sued by either. Again, is it reasonable or right that a debtor, finding his estate bound by executions of prior *teste*, should have the power to sever from the estate covenants annexed thereto for its protection, and assign them to a third person, whereby the estate thus "*stripped naked*" would sell for nothing, and his creditors be defrauded? Certainly there is no reason for such a doctrine, and no authority was cited to sustain it.

PER CURIAM. *Venire de novo.*

Cited: Register v. Rowell, 18 N. C., 315; *Spruill v. Leary, post*, 419; *Sutherland v. Stout*, 68 N. C., 450; *Wiggins v. Pender*, 132 N. C., 638, 640.

(198)

WATERMAN & SONS v. LEWIS WILLIAMSON.

One who has purchased the interest in a *chose in action* without having acquired a legal title, and thus is authorized as agent to bring a suit at law in the name of his assignor, may also in the same name prosecute any action growing out of the same and collateral to it, as in this case an action against a sheriff for not serving in due time a notice to take depositions placed in his hands by such assignee.

APPEAL from *Bailey, J.*, at Fall Term, 1851, of COLUMBUS.

The case is stated in the opinion of the Court.

D. Reid and Troy for plaintiffs.
Strange for defendant.

PEARSON, J. The plaintiffs, having an action against one Susannah Wells pending and to be tried at the next term, obtained a commission to take the depositions of certain witnesses, and delivered to the defendant a notice of the time, which it was his duty as sheriff to serve on the said Wells. Defendant did not serve the notice in time. The depositions were taken, but at the trial were held inadmissible, because the notice had not been served in time, for which cause the plaintiffs were obliged to submit to nonsuit, which was afterwards set aside upon terms, viz., upon the payment of the costs, which were paid by Robert Powell. Thereupon, plaintiffs brought this action for damages for neglect of duty as sheriff in not serving the notice.

The defendant by his counsel made many objections, and the court being of opinion against the plaintiffs, they submitted to a nonsuit and appealed. We differ from his Honor, and regret that he did not state upon which of the objections he put his opinion, for it seems to us none of them are tenable. We should like to know to which our attention ought to be more particularly directed.

1. The plaintiffs "declared for not *duly* serving the notice. (199) This refers to the *manner* and not to the *time*, and no defect in the manner of serving was proven." We think it sufficient to say that if the notice was not served in time to make the depositions admissible, it is the same as if it had not been served *at all; ergo*, it was not *duly* served.

2. "There was no evidence that Powell was the agent of the plaintiffs, and made the payment for them." Mr. Maultsby (the attorney in the original suit) swore "that he was employed by Powell, who appeared to him to be the party really interested, and to be carrying on the suit for his benefit." We think there is *some* evidence that Powell was the agent of the plaintiffs, and it made out an agency of this kind: Powell was the

purchaser of the chose in action against Mrs. Wells, and thereby became the beneficial owner, and, although he is not recognized in a court of law as the owner, yet he is recognized as the agent and attorney in fact of his assignors, and may carry on a suit in their names for his use upon the original cause of action, or upon a cause of action (like the present) arising collaterally in such original suit.

3. "If the plaintiffs paid the money, the payment was made by them without necessity, as Powell was the party really interested, and they were under no obligation to refund any payments made by him." This exception is involved in the second, already considered, and is based on the same facts, by assuming a different *supposition as to the law*. We had supposed it was well settled that one who purchases a note or bond, without taking a regular assignment, had a right to use the names of the obligee, to sue for and receive the debt, or to sue for any cause (200) of action incidentally arising out of the first action, giving bond to indemnify against costs, etc., if required. The court might well have refused to entertain this exception, on the ground that there was no evidence of any payment by the plaintiffs, except through the agency of Powell, which question was involved in and must necessarily be settled by the second exception.

4. "There was no evidence that the plaintiffs had any right of action against Sarah Wells, and *non constat*, but they would have been nonsuited with the depositions as well as without them." We do not feel at liberty to decide the question of law involved in this exception, because it is not presented by the facts. We have looked into the depositions, and they prove that the plaintiffs did have a right of action against Susannah Wells.

5. "If the plaintiffs were not ready for trial, it was their own folly to go into it; they ought at least to have attempted a continuance, and have no right to throw on the defendant the consequences of their neglect." We are at a loss, even from conjecture, for any principle of law by which the defendant has a right to insist that the plaintiffs were bound to move for a continuance, because they were not ready for trial, in consequence of *his* neglect in not serving the notice. How often would the plaintiffs, in deference to the sheriff who had neglected to do his duty, be called on to attempt to continue the case? How long was it their duty to keep the suit pending (during all which time costs would be accumulating, and they would be deprived of the use of their money), for the purpose of indulging a neglect of duty on the part of a sworn officer?

PER CURIAM. *Venire de novo.*

(201)

JOHN MARTIN ET AL. v. SARAH AMOS.

A bond, with a condition that the plaintiffs should "break the will" of a deceased person, of whom the obligors were next of kin, or "if they failed to break the will, should pay all the costs of the suit that shall be brought," is void on the ground of maintenance and as being against public justice.

APPEAL from *Ellis, J.*, at Fall Term, 1851, of STOKES.

The case is stated in the opinion of this Court.

Gilmer and Miller for plaintiffs.
Morehead for defendant.

NASH, J. The defendant, with several others, the widow and next of kin of Robert Tucker, deceased, executed to the plaintiffs their joint and several bond, to pay to them the sum of $200, upon condition that they, the plaintiffs, broke the will of said deceased; and in the bond it was stipulated that the plaintiffs, if they failed to break the will, *"should pay all the costs on the suit that will be brought."* The suit was brought, and upon the trial the will was not broken, but established as to the real estate. After the determination of the suit, this action was brought on the bond, to recover the sum of $50, a balance due upon it. Among other pleas was the following: "That the bond was contrary to the policy of the law, and void." His Honor, the presiding judge, being of opinion with the defendant upon this special plea, the plaintiffs submitted to a nonsuit and appealed to this Court.

We had thought that at this day not a doubt could rest upon (202) the correctness of the opinion expressed by the judge below. The object of all laws is to repress vice and to promote the general welfare of the State; and no one can be assisted by the law in enforcing demands founded on a breach or violation of its principles. Hence sprung the maxim at common law, *"Ex turpi contractu non oritur actio."* It is the public good which allows a contract to be impeached for the illegality of the consideration. Nor does a seal, which in itself imports a consideration, protect the contract from being investigated in a court of common law. A defendant, therefore, though he is not at liberty to show that a bond executed by him is without consideration, may, nevertheless, prove that the consideration upon which it was given is illegal, as being immoral or contrary to public policy. And among the latter the most prominent are contracts affecting the course of justice. They are the most prominent because every individual in the community is interested in the pure and upright administration of the laws. Every contract, therefore, for the compounding or stifling of a criminal prosecu-

tion for a felony or misdemeanor of a public nature is void. *Collins v. Blantern*, 2 Wil., 347; *Stanly v. Jones*, 20 E. C. L., 165. Maintenance is an offense against public justice, and is defined by *Justice Blackstone*, 4 Com., 134, to be "an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defend it, and is punishable at common law by fine or imprisonment." Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the subject in dispute, if they prevail, whereupon the champertor is to carry on the suit at his own expense. Mr. Blackstone calls such persons "*pests* of society,
(203) that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels." "These offenses," he observes, "relate chiefly to the commencement of suits." All contracts, then, founded upon either or both of these offenses are absolutely void. In this case the defendant has not been driven to parol evidence to establish his defense. It is stated on the face of the instrument, as the consideration upon which the contract was made. It was an officious intermeddling by the plaintiffs in a suit that no way concerned them, and assisting the obligors with money in carrying on a suit to be commenced. Such a contract is immoral and illegal, and a court of law cannot lend its aid to enforce it.

PER CURIAM. Affirmed.

Cited: Barnes v. Strong, 54 N. C., 107; *Munday v. Whissenhunt*, 90 N. C., 461; *Smith v. Hartsell*, 150 N. C., 80.

STATE v. ABRAM WEAVER.

In indictments for misdemeanors the court may, without the consent of the defendant, withdraw a juror when in its discretion it judges it *necessary* to the ends of justice.

THIS was an application to this Court on behalf of the defendant for a *certiorari* to the Superior Court of FORSYTH.

The facts are stated in the opinion of this Court.

(204) *Attorney-General for plaintiff.*
Mendenhall and J. H. Bryan for defendant.

NASH, J. The prisoner is indicted for receiving from one Dean a negro man slave, named Lewis, the property of one Smith, knowing that

Dean had stolen him. Upon the trial of the case the prosecuting officer introduced evidence to prove the defendant's guilt, and closed his case. Whereupon it was stated by the court that under the evidence in the case the prisoner could not be convicted, as it appeared that Dean, the man who it was alleged had committed the felony, was then in confinement in the jail of Guilford County, and had not been tried. Whereupon the court, without the consent of the prisoner, but in opposition to his wishes, ordered a juror to be withdrawn. The defendant has brought his case before this Court upon a motion for a writ of *certiorari.*

His Honor below is sustained in the course he pursued by *S. v. Morrison,* 20 N. C., 113. The Court there decided that "It must, from the reason and necessity of the thing, belong to the court on trials for misdemeanors to discharge the jury whenever the circumstances of the case render such interference *essential* to the furtherance of justice. Every question of this kind must rest with the court under all the peculiar circumstances of the case." To this doctrine we now fully assent. The case before us is that of a misdemeanor, and it was within the power of the presiding judge, if he thought it essential to the furtherance of justice, to withdraw a juror. In *People v. Olcott,* 2 Johnson, 301, *Judge Kent,* in delivering the opinion of the Court, says there is no alternative; either the *court* must determine where it is requisite to discharge the jury or adopt the rule as laid down by *Lord Coke* in cases of felony (1 Inst., 227; 3 Inst., 110), that after a jury (205) is once sworn and charged, no other jury can, in any event, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, then a door is opened for the exercise of the discretion of the court; *he* must judge of that necessity and determine what combination of circumstances will create one. Many cases are reported exhibiting that necessity, as where the jury have made long and unavailing efforts to agree, where the juror, after being charged, becomes mentally or physically disabled by sickness or intoxication, or where a witness is absent under circumstances authorizing the belief that he is kept away; and many other causes for the exercise of this discretion are enumerated by the opposite party. Only one case is reported, that I can find, which presents a case much, if not precisely, like this. It is *King v. Jeffs,* Str., 984. There the defendant was prosecuted for barratry. After the jury was charged, the prosecutor proved that his evidence was deficient, and moved the court to withdraw a juror. *Lord Hardwick* refused the application, because the punishment might be infamous; but he said "it might be, and had been, done in other cases of misdemeanor." In refusing the application, the judge admitted the power to grant it. And *Judge Kent,* in commenting on this case and approving of the decision, remarks, "For to allow the prosecution in any

case to withdraw a juror because he finds himself not fully prepared in his proofs, is an unreasonable indulgence, unless it appear that some part of the testimony was wanting through the contrivance or agency of the defendant." The rule, then, is that in misdemeanors the court may withdraw a juror when in its discretion it judges it *necessary* to the ends of justice. No precise rule can be laid down to govern the infinite variety of cases that may come under the general question touch-
(206) ing the power of the court to discharge juries charged in criminal cases of misdemeanor. It must be left in the sound discretion of the judge who tries the cause. And it is right it should be so. The reasons for exercising the power must be more accurately perceived and more justly felt by him than by any other court. But aside from its propriety, it being a matter of discretion, this Court has no power to interfere. *Brady v. Beason,* 28 N. C., 425.

PER CURIAM. Motion refused.

Cited: S. v. Tillotson, 52 N. C., 115; *S. v. Johnson,* 75 N. C., 124; *S. v. Bass,* 82 N. C., 572; *S. v. Leak,* 90 N. C., 657; *S. v. Thompson,* 95 N. C., 601; *S. v. Jacobs,* 107 N. C., 779; *S. v. Mitchell,* 119 N. C., 786; *S. v. Andrews,* 166 N. C., 351; *S. v. Upton,* 170 N. C., 770.

DEN ON DEMISE OF JONATHAN WORTH v. BETHANY YORK.

Property conveyed to a married woman, after a decree obtained in her favor under the act, Rev. Stat., ch. 39, sec. 12, is not protected against the claims of the husband's creditors if the husband has paid, either from his own means or the earnings of his infant children who live with him, the whole or any considerable portion of the purchase money.

APPEAL from *Bailey, J.,* at Spring Term, 1851, of RANDOLPH.

The lessor of the plaintiff claimed the premises as a purchaser at a sale made by the sheriff in May, 1846, under an execution issued upon a judgment rendered in November, 1844, against the defendant Seymore York; and gave evidence that York and his wife, who is the other defendant, were in possession at the time of the sale and at the commence-
ment of the suit.
(207) On the part of the defendants a deed was then read, bearing date 20 September, 1845, from one Coffin to the defendant Bethany, whereby, in consideration of $25 paid by her as recited, he conveyed to her the premises in fee, consisting of 1½ acres of land. And the defendant further gave in evidence the record of a suit brought

in the Superior Court by the defendant Bethany in July, 1844, against her husband by petition, wherein she alleged that he had become an habitual drunkard and spendthrift, wasting his substance to the impoverishment of his family, consisting of his wife and eight children, so that he had become insolvent, and all that she and the children earned was taken upon executions against him; and she prayed that all such property as might thereafter be purchased by her own industry, or accrue to her by descent, devise, gift, bequest, or in any other manner, should be secured to her, and not be liable to the power, control, dominion, or debts of her said husband, and that she might sue and be sued, in her own name, without joining her husband: and thereupon a decree was made, in April, 1845, in her favor, in the terms of the prayer of the petitioner, as to any estate, real or personal, she might acquire, subsequent to the decree.

On the part of the plaintiff evidence was then given that in 1843 the wife contracted with Coffin for the purchase of the lot of ground in order to build a house on it, as a residence for herself and family, convenient to a factory belonging to Coffin, in which her children might be employed, and that four of them worked in the factory on wages, the eldest of whom was 14 years old, and that the conveyance was to be made when the purchase money was paid; that York and his wife lived together, and that he was a drinking man, but seldom so (208) drunk as not to be able to work, and generally engaged in doing something towards the support of his family; that the wife paid Coffin $6 towards the purchase money, and that there was then due, on account of the wages of the children, more than enough to satisfy the residue thereof, and Coffin then offered to come to a settlement therefor and make her a deed, but she declined taking it at that time, saying that she had a petition pending against her husband, to be allowed to hold the property she might acquire to her own use, and wished to put off taking the deed until she could get a decree in her favor. That she employed a person to build a house on the lot, and that her husband did not assist in the building, except in making the chimney, and that the house was worth $75; and that after the decree was made, Coffin executed the deed and left it with his clerk, to settle the account with Mrs. York, and deliver the deed, and he did so. The court instructed the jury that if they should find that the wife paid any portion of the purchase money to Coffin, however small, with money acquired by her after the decree, the plaintiff could not recover.

Under these instructions the jury found for the defendant; thereupon the plaintiff appealed.

Mendenhall for plaintiff.

RUFFIN, C. J. As the case is understood, the purchase money was made up of the $6 paid by the wife pending the petition, and of the wages of the infant children earned in Coffin's service, pending the petition, or at all events, prior to the making of the deed. That being established affirmatively, and no evidence being given of any other mode in which the wife paid for the land, it would seem that it was left
(209) to the jury to find that some part of the price was paid by her out of her subsequent acquisitions, without any evidence on which it could be so found. But if this were otherwise, the Court is of opinion the instruction is still erroneous. It is true that, regarding the husband's interest in the land as a trust, resulting from the purchase being made with his privity and partly with his money and partly with his wife's, and especially if it was a covinous contrivance against his creditors, the creditors would be compelled to go into a court of equity for relief, and could not sell the land by execution at law, either under the Statute of Elizabeth or the act of 1812. *Page v. Goodman*, at this term, 43 N. C., 16. But, although the wife's legal estate is not divested by the sale, as it would be if the trust were liable to execution, it is to be inquired whether, considering the land as the wife's, in law, the husband, by virtue of marital rights, had not an estate therein as tenant by the curtesy, which passed by the sheriff's sale, made prior to the act of 1848, ch. 41. The Court is of opinion that he had, and that the lessor of the plaintiff acquired that estate, though he did not the fee. The only objection to that is that by virtue of the decree the wife held this land to her own use exclusively, and the husband had no dominion over it, and it was not subject to his debts, because she acquired it after the decree. That also would be true if this be her subsequent acquisition, in the sense of the statute. But it seems clearly not to be; for when the act and the decree founded on it secure to the wife such property as she may thereafter get by her own industry, or may accrue to her by gift, descent, or in any other manner, they certainly do not mean such property as she may derive from the husband himself. The purpose is to exclude him from the power of wasting what the wife gains with her own hands, or is bestowed on her by the bounty of friends, or cast on
(210) her by law. It was not intended that he might endow her, directly or indirectly, so as to exclude his marital rights in lands of his own provision for her, and thereby defeat his creditors. Such a case is not within the purview of the act at all. It was never supposed that such a husband should have lands to convey or money to pay for them to other persons who should convey them to his wife; and it seems to be a palpable fraud on this statute for him to supply the means of making the purchase, and then take the conveyance in her name, so as to give it the false appearance of an acquisition by her own means alone or by

the bounty of a friend. If, then, this purchase was made by the $6 paid by the wife, pending the petition, which was in law the husband's money, and the wages earned by the infant children during the same period, which also in law belonged to the father, it would be a case of fraud on the law, and the decree would not exempt the land from the marital rights of the husband and the creditors attaching to it in the same manner as if no such decree existed. That is supposed, in the instructions, to be the law, if the whole consideration moved from the husband; but it was laid down to be otherwise if any part of it, however small, were got by the wife after the decree. That, however, cannot be correct, since the advance of a trivial sum merely to give color to the transaction cannot purge the falsehood and fraud really existing. But in truth the case need not, in the opinion of the Court, go to that extent; for, according to the policy and true meaning of the act, all pecuniary dealings between the husband and wife are not the less invalid than they were at common law, as they tend, obviously, to evade the act; and in matters of fraud every evasion of the law is a violation of the law. These parties cannot deal with each other, nor can they deal together with other persons so as to invest property conveyed to the wife with the protection of (211) the decree, and make it her separate legal property, to the exclusion of the husband and the defeating of his creditors. It is not essential to the lessors of the plaintiff, therefore, that the balance of the purchase money should have been paid out of the wages earned by the children before the decree. It is the same even if they were earned afterwards; for, although the act produces the somewhat strange anomaly of a wife's living with her husband, and at the same time being independent of him, as to her personal occupations, and entitled exclusively to all she can make, it does not go the length of making her the head of the family to all intents, so as to entitle her to rule and dispose of the infant children, and take the profits of their labor also; but they still belong to the father. And the Court holds that it is likewise the same if the proportions of the price paid by the husband and wife are so unequal as to constitute the purchase substantially the husband's, as being made with his means, while the advance by the wife must, from its small amount, be regarded as colorable and evince the intent to evade the act by covering a gratuity of the husband under the semblance of an acquisition of her own and by means of her own. Such a case is out of the act altogether; and, therefore, the instructions were erroneous, and the judgment must be reversed and

PER CURIAM. *Venire de novo* awarded.

Cited: Winchester v. Reid, 53 N. C., 379.

(212)

WILLIAM TRICE ET AL., ADMINISTRATORS, v. JAMES C. TURRENTINE.

1. Upon the plea of "*nul tiel record*," whether the record exists is a question of fact; what is its legal effect is a question of law. From a decision on the former, the party cannot appeal; from a decision on the latter, he may.

2. Where a *sci. fa.* on a judgment is issued and the plaintiff is nonsuited and issues a second *sci. fa.*, a variance between the latter and the former is not material, if both be for the same cause of action and between the same parties.

3. In an action on a penal bond the judgment should be for the penalty of the bond and the costs. The damages assessed form no part of the judgment, but should be entered at the foot of the record and endorsed on the execution for the guidance of the sheriff.

4. Where a judgment on the plea of "*nul tiel record*" is reversed on appeal, the case must be sent back for the judgment of the court below as to the fact of the existence of the record.

5. Where there is a penal bond for the payment of money, interest may be recovered upon the sum really due up to the time of payment, even after judgment. But if the condition is for the performance of some collateral act, as to execute a mortgage or deed of trust as additional security for payment of money, interest cannot be recovered on a *sci. fa.* upon the damages assessed.

APPEAL from *Bailey, J.*, at Spring Term, 1851, of ORANGE.

This was a *scire facias* to subject the defendant as special bail of Nathaniel King. Plaintiff offered in evidence the transcript of a record marked A and B, which are annexed and made a part of this case. Among other pleas, the defendant pleaded "*nul tiel record*" and statute of limitations.

Under the plea of *nul tiel record*, the defendant insisted that there was a variance between the judgment recited in the *scire facias* and the judgment offered in evidence. A copy of the judgment so offered is hereunto annexed and marked A.

(213) In order to avoid the statute of limitations the plaintiff replied that there was a nonsuit in the first *scire facias*, and that deducting the time during which that was pending, four years had not elapsed from the original judgment, and that this *sci. fa.* was for the same cause of action. Defendant rejoined that the causes of action in the *sci. fa.* were not the same, also that the parties were not the same.

A verdict was entered in favor of the plaintiff, by consent of parties, subject to the opinion of the court upon the points of law reserved, and it was agreed that if the court should be of opinion with the defendant, the verdict should be set aside and a nonsuit entered.

The court was of opinion that there was a variance between the *sci. fas.* and the judgment, and according to the agreement the verdict was set aside and a nonsuit entered.

The plaintiffs prayed an appeal to the Supreme Court, which was granted.

Norwood, McRae, Moore, and Iredell for plaintiffs.
J. H. Bryan, W. H. Haywood, and J. H. Haughton for defendant.

PEARSON, J. It was insisted for the defendant that the decision of his Honor in the court below, upon an issue on *"nul tiel record,"* was conclusive, and could not be reviewed by this Court. We do not assent to the proposition, except to a qualified extent. There is a distinction between the existence of a judgment and its legal effect. *Its existence* is a matter of fact, to be judged of by inspection; and, as is said in one of the old cases, the judge below is presumed to have as good (214) eyesight as the judges of this Court, and being a matter of fact, to be ascertained by inspection, it is admitted his decision in regard to it cannot be reviewed.

Its legal effect is a matter of law, so what amounts to a variance is matter of law; and as the issue involves these questions of law, although the decision is final as to the fact, viz., the mere existence of the record, it is not so as to them. There is the same reason for revising questions of law involved in "issues" tried by the court as when they are involved in "issues" tried by juries. For instance, an issue upon *"non est factum"* is submitted to the jury; the instruction as to what is a delivering or what would be a fatal variance is subject to exception, and may be revised, because they are questions of law. It is not the same when an issue upon *nul tiel record* is submitted to the court. In one case he instructs the jury as to the law; in the other case he *instructs himself,* if I may use the expression, as to the law; and although in neither case can this Court revise the conclusion in regard to the mere matter of fact, yet in both an error in regard to the law is a ground for a bill of exception. It is idle to say that because in issues of one kind the same tribunal passes upon the facts, as well as the law, therefore there is a difference, and errors of law should not be corrected. It is believed that the distinction above pointed out will explain and reconcile all of the cases in our books, except *S. v. Raiford,* 13 N. C., 214. There the Court says very truly, "The issue joined on a plea of *'nul tiel record'* involves a question of fact as to the existence of a record," but the fact was not adverted to, that the issue *also involves* a question of law, viz., What amounts to a variance? for the fact of the existence of the record

(215) was not controverted, and the case turns upon the question of variance. In many subsequent cases the distinction is adverted to, and this Court did not hesitate to review the decision of the court below upon questions of law. *Carter v. Wilson*, 18 N. C., 363; *S. c.*, 19 N. C., 276; *Bond v. McNider*, 25 N. C., 440, and many other cases, in which this Court review decisions of the court below as to the meaning of entries on records, their legal effect, and what amounts to a variance.

The second point made by the defendant presented a question as to the proper construction of the case sent up, and upon this we had much difficulty. The defendant, by his plea, relied on the statute of limitations. The plaintiffs *replied* that he had issued a *sci. fa.* on the original judgment to subject the defendant as bail, on which proceedings pended for several years, and finally there was a nonsuit, which proceedings were for the same cause of action and between the same parties, and deducting the time during which said proceedings were pending, four years had not elapsed since the rendition of the original judgment. The defendant *rejoined* that the *sci. fa.* and the proceedings mentioned were not for the same cause of action and not between the same parties; he concludes to the contrary, thus tendering an issue of fact, to which the plaintiff enters a "*similiter*," and the jury were impaneled to try the issue, "who find all of the issues in favor of the plaintiff (by consent of the parties), subject to the opinion of the court upon the point of law reserved, and it was agreed that if the court should be of opinion with the defendant, the verdict should be set aside and a nonsuit entered." If, "by the point of law reserved," reference is had to the question growing out of the plea of "*nul tiel record*," which will be noticed below, we can understand it clearly, but if reference is had to any point (216) of law reserved in regard to the matter submitted to the jury, then we confess we are at a loss to understand it; nothing was submitted to the jury but the mere question of fact, Were the first *sci. fa.* and proceedings thereon for the same cause of action, and between the same parties, as the present *sci. fa.*?—the existence of the first *sci. fa.* and proceedings set out in the replication being confessed. When the replication was filed the defendant had his election to adopt one of two courses. He could rejoin "*nul tiel record*," thereby tendering an issue to be tried by the court as to the existence of the first *sci. fa.* and the proceedings and judgment of nonsuit in the replication, contained, which would have involved the question of their legal effect, and whether there was a variance. Or he could rejoin, traversing the fact that the said proceedings were for the same cause of action and between the same parties, thus confessing the allegation that there were such proceedings, and making an issue to the jury as to whether they were for the same

cause of action and between the same parties. He was not at liberty to do both, for the Statute of Anne which allows two or more "pleas" does not extend to "replications" or "rejoinders," and the defendant was, consequently, put to his election. He chose to rejoin, tendering an issue upon the fact of the identity of the cause of action and of the parties, so the jury had no question of law submitted to them—the effect of the record and any question of variance being "confessed." We can, therefore, see no ground upon which to disturb the verdict. In *Carter v. Wilson*, 18 N. C., 365, it is said: "The transcript sent to this Court does not set forth the replication, and we must, therefore, presume it to be the general one, according to the loose practice, in which the profession will indulge themselves." But in this case, in regard to the rejoinder, there is no room for presumption, because the parties have filed formal pleadings, and the rejoinder tenders issue upon the identity of the cause of action and parties, and concludes to the contrary.

It may be well to remark that if the question of variance between (217) the first and the present *sci. fa.* could be presented, we see no *fatal* variance. If a variance in form or recital be fatal, then the provisions to take out of the operation of the general statute cases of arrest of judgment, nonsuit, etc., are nugatory; for, if the first has no defect in form or recital, there will be no arrest of judgment or nonsuit; and if there be such defect, and the *second must pursue the first,* to avoid a variance, then there will be the same defect, and cause for arrest of judgment or nonsuit. This is absurd, and the many provisions made to save the remedy, to such as honestly endeavor to pursue their cause of action, and are mistaken in the proper form or mode of proceeding, will be of no force or effect. Vent., 252, anon. In reply to the statute of limitations, plaintiff avers "plaint in sheriff's court, which was removed hither," with an averment it was for the same cause of action; "rejoinder" it was for a larger sum; demurrer, though there be a variance *in the sum,* yet it may be averred to be for the same cause of action, and *so the court agreed."*

If the cause of action be the same, it is immaterial that the *form* of action is different, as in pleading former judgment in debt, as a bar to an action of assumpsit on the same contract. 4 Rep., 94 b; 3 Chitty Pl., 929. Trespass *vi and armis de bonis asportatis* —nonsuit—trover within one year—averment for some cause of action; good replication to the plea of the statute of limitations. 2 Sanders, Williams' notes, 639.

It remains to decide the main question in the case, which arises on the plea of *"nul tiel record,"* and presents the question of variance between the original judgment in the county court and that recited in the present *sci. fa.* The record of the verdict and of the memorandum

(218) on the docket, from which to enter up a formal judgment, is in these words, "Who find the bond declared on is the act and deed of the defendants, that the conditions thereof have not been performed, but broken; no payment or set-off. The penalty of the bond is $20,000, and assess damages for breaches to $4,664, which is principal money, and judgment of said court was rendered thereon, and for cost of suit." This entry was made at May Term, 1841.

The recital in the *sci. fa.* is in these words: "And although the said Zachariah Trice, at the term of the said court of pleas and quarter sessions for Orange County, held on the fourth Monday of May, 1841, by consideration and judgment of said court, recovered against the said James E. Norfleet, Nathaniel King, and William Durham his said debt of $20,000, and his costs in the said court, *which were taxed by the clerk at the sum of $15.86, which sum of $20,000 might be discharged by the payment of the sum of $4,664, the damages assessed by the jury for the breaches of the conditions of the bond declared on, with interest upon the same from 18 May, 1841*, which judgment is still in full force and not paid and satisfied, as by the record thereof appears."

We think there is no variance. The proper judgment in the original action was that the plaintiff *recover* of the defendant the sum of $20,000, together with his costs, for the Statute of 8 and 9 William III, and our statute in the same words, Rev. Stat., ch. 31, sec. 63, expressly provide, "That like judgment should be entered on such verdict as heretofore hath been usually done in such like actions," and it is settled by the authority of Sergeant Williams and the cases cited by him (Saunders, 58 n, 2, 187, note) that the damages assessed do not form a part (219) of the judgment, but should be entered "at the foot" of the record, and be endorsed on the execution for the guidance of the sheriff. The words of the recital, therefore, which I have put in italics, do not form a part of the judgment, and ought to have been rejected as surplusage. *"Utile per inutile non vitiatur."*

The other questions in the case were properly abandoned. The verdict concludes the questions made on the "rejoinder," and the only question open is on the *"plea"* of *"nul tiel record."* In the decision upon that, we find there is error. And the last question is, Can this Court enter a final judgment for the plaintiff, or must the case go back on this point? After much consideration, our conclusion is it must be sent back. If a jury find a verdict, and the case comes up on exceptions to the instructions of the court, and we find there is error, the only course is to send the case back upon a *venire de novo*, for *non constat* how the jury will find the fact with proper instructions. So here the judge has found the fact as to the existence of a record, which he has sent up to us, but he

came to an erroneous conclusion as to what amounts to a variance. For that reason we reverse the judgment rendered upon his decision of the issue. But *non constat* how the court below will find the fact with proper instructions as to the law involved in the issue; in other words, when we reverse the judgment, the issue of fact, as to the existence of the original judgment, has not been passed on, and the case must go back for that purpose.

We feel it is proper to remark that the courts below should be liberal in the exercise of the discretion in allowing amendments to correct the misprisions of the clerks, and all informal entries, when it is in advancement of substantial justice and the "speedy decision" of cases upon their merits. This is manifestly in accordance with the intention of the Legislature in passing the several acts giving power to (220) make amendments. It is known that no persons in our country are trained by profession for clerks, and but few, according to our present mode of appointment, remain in office long enough to acquire a thorough knowledge of the duties of the office; and for this reason, also, the members of the bar should not oppose any proper application for amendment which does not go to the merits of the case, for "if the profession will indulge themselves in the present loose practice," they certainly should not take advantage of this indulgence to themselves by using it to the prejudice of third persons who may be concerned in the premises. This plaintiff has been in "hot pursuit" of his cause of action for eleven years, and "the chase is not yet up."

There was much discussion in the argument before this Court upon the question whether the plaintiff, if he recover will be entitled to interest upon the amount of the damages assessed. We have given the subject much consideration, and it may be as well to express our present impression without, of course, meaning to decide the question definitely; for that we are not at liberty to do. The penal bond, upon which the original judgment was rendered, was not sent as a part of the case, and it is not *before us so that* we can *judicially* know its contents. When there is a penal bond for the payment of money, interest may be recovered upon the sum really due, up to the time of payment, even after judgment; that is provided for by the Statute of Anne, Rev. Stat., ch. 31, secs. 106, 107. But if the condition is for the performance of some collateral act, as to execute a mortgage or deed of trust, as additional security for the payment of money, interest cannot be recovered upon the damages assessed, for that is regulated by the Statute 8 and 9 Wil., Rev. Stat., ch. 31, sec. 63, by which it is provided: "If by reason of any execution executed, the plaintiff shall be fully paid all such *damages so to be assessed,* with his costs of suit and all reasonable (221)

charges and expenses for executing said execution, the body, lands, and goods shall be forthwith discharged from said execution." It may be well to add that in reversing the judgment the only point left open is upon the plea of "*nul tiel record*," and the verdict is not disturbed upon the other issues.

PER CURIAM. Reversed.

Cited: Simpson v. Simpson, 63 N. C., 535; *Cureton v. Garrison*, 115 N. C., 551.

DEN ON DEMISE OF JOHN J. GRANDY v. MARTHA BAILEY.

1. A widow, continuing in possession of land, is estopped to deny the title derived under her husband's deed.
2. One may be equally estopped as to two adverse claimants so as to be concluded when sued by either.
3. Thus, where a widow in possession claiming dower was estopped by deed given by her husband, she cannot remove the estoppel and defeat the bargainee by giving up her possession to one claiming under a *fi. fa.* prior to the deed, and then immediately resuming the possession under him.

(222) APPEAL from *Settle, J.*, at Fall Term, 1851, of PASQUOTANK.

John Bailey was seized in fee of the premises, and on 7 January, 1843, he conveyed them by deed of bargain and sale to Reuben Overman, one of the lessors of the plaintiff, upon trust to sell, and with the proceeds pay certain debts. Bailey continued in possession, with the consent of Overman, until his death, in 1850; and the defendant, who is his widow, continued in possession afterwards; and in December, 1850, she filed a petition against the heirs of her late husband for dower in the premises, and it was adjudged and laid off to her, and the report confirmed the first Monday in March, 1851. On 5 March, 1851, Overman sold and conveyed the premises to John J. Grandy, the other lessor of the plaintiff, and upon the defendant's refusing to let him into possession, this action was brought on 9 April following.

On the part of the defendant evidence was offered that a judgment was obtained by John C. Ehringhaus against John Bailey, in March, 1830, and a *fieri facias* was then issued thereon and levied on the premises, and that writs of *venditioni exponas* issued thereon regularly until the premises were sold under one of them, in March, 1844, to the said Ehringhaus, who took a deed from the sheriff. And the defendant

offered further to prove by one Mathews that a public road ran through the premises, near to the house in which the defendant dwelt, and that on 28 March, 1850, he, as agent for Ehringhaus, went to the premises, and that the defendant locked the door of the house and brought the key out to the road where he was, and then delivered it to him, saying she surrendered up the possession of the premises to him as the agent of Ehringhaus, and that then he redelivered the key to her and told her to keep possession as tenant of his principal, and she went back into the house.

Counsel for plaintiff objected to receiving the evidence on the (223) ground that the defendant was estopped to show title out of her late husband. But the court admitted it, and thereupon told the jury that if they believed the facts deposed to by Mathews, the plaintiff could not recover. The defendant had a verdict and judgment, and the plaintiff appealed.

Smith for plaintiff.
Heath and Ehringhaus for defendant.

RUFFIN, C. J. *Bufferlow v. Newson,* 12 N. C., 208, and *Williams v. Bennett,* 26 N. C., 122, establish that a widow, continuing in possession, is estopped to deny the title derived under her husband's deed. So that the question is whether she was discharged from that estoppel by what passed between her and Ehringhaus. The Court is of opinion that she was not. It was argued that she was equally estopped as between herself and each of the other parties, and therefore must be at liberty to rely on the better title. But that does not follow; for one may be equally estopped as to two adverse claimants, so as to be concluded when sued by either, as if a tenant of A. take a lease from B., so it would seem it must be also upon the modern rule, which is called an estoppel, but is founded on the necessity of enforcing good faith on the part of one in possession under another's title, and has been applied in favor of a person claiming under a sheriff's sale or deed of trust, against the debtor in execution, or the maker of the deed, and those subsequently claiming under him. If there be adverse claimants under different sheriff's sales or conveyances, good faith requires the party, and his heirs or widow, to stand indifferent between them, and not to defend the possession kept by them under an arrangement with either of the parties. Suppose, for example, that one purchases under execution against A. and the (224) other claims under a prior deed, that was fraudulent against creditors: certainly, in a suit by the latter against A., he could not protect his possession by alleging his own fraud, and that in consequence thereof the purchaser from the sheriff had the better title, and he had

agreed to hold under him. That is a controversy which in good faith he ought to leave exclusively to those claimants. Standing in the relation he bears to both of them, he ought not to make himself a party to it, because he cannot do so without in some degree depriving one or the other of the absolute right he has to claim the possession as against him. It was, however, contended at the bar that *Jordan v. Marsh*, 31 N. C., 234, is to the contrary. But the case was not intended to impeach the general rule, and it was so stated by the Court. On the contrary, the circumstances there were very special, and authorized the exception then made. One of the purchasers at sheriff's sale had recovered in ejectment, and no imputation of fraud therein was made. And he was on the eve of taking actual possession under a writ of *haberi facias*, when the tenant took a lease from him. The Court was of opinion that if the tenant had been actually put out of possession by the sheriff, and had afterwards entered under a new lease, he might have defended such new possession, under the title of his landlord, against a subsequent ejectment by the other purchaser from the sheriff; and therefore it was held that he might take a lease from him who had recovered in the ejectment, without an actual eviction on a writ of possession, the Court saying, "For what end should he be required to go through the useless form of being put out of possession, merely to be at the trouble of going back again?" The decision proceeded on the manifest *bona fides* of the transaction, following the determination of the question of title in the
(225) ejectment, by which means the writ of possession was but a formality. It was, therefore, a peculiar case, and is not applicable to the present, for this defendant has manifestly resorted to a contrivance for changing her relation to the lessors of the plaintiff, without any actual change of her possession. The trustees' sale had just been made, and her own dower just assigned, and the conclusion is irresistible that she went through the pretence of giving up the possession, without actually doing so, for the sake of defeating the purchaser from the trustee, by defending her old possession under color of Ehringhaus' claim. It was surely erroneous to assume that the transaction was *bona fide*, and tantamount to an actual departure from the premises, and then getting a new possession under a *bona fide* lease.

PER CURIAM. *Venire de novo.*

Cited: Freeman v. Heath, *post*, 500, 501; *Gilliam v. Moore*, 44 N. C., 97; *Page v. Branch*, 97 N. C., 100; *Love v. McClure*, 99 N. C., 295; *Atwell v. Shook*, 133 N. C., 393.

DEN ON DEMISE OF H. G. SPRUILL ET AL. v. J. LEARY ET AL.

Where A., who had a fee simple, defeasible in the event of his dying without issue living at his death, conveyed the land in fee with general warranty to B., and afterwards died without issue: *Held*, that the collateral warranty barred his heirs and those claiming under him.

APPEAL from *Settle, J.*, at Fall Term, 1851, of WASHINGTON. (226) James Jones was seized in fee of a tract of land of which the premises were part, and in 1815 he devised it to his sons, James, Jesse, Thomas, William, and Friley, and their heirs, equally to be divided between them: "and if at the death of either or any of my said sons they should leave no surviving issue, my will is that the survivor or survivors of my said sons shall inherit the deceased child or children's part of the land." The sons entered, and one of them, Jesse, died in 1820 without having been married. In 1824 the other four united in a petition for partition, which was decreed and made, and thereby the premises described in the declaration were allotted to the son William, as his share, and he entered therein; and on 22 December, 1825, he sold the same to Robert Blount, and conveyed them by a deed of bargain and sale, with a covenant of general warranty for himself and his heirs. Blount entered, and he and those claiming under him, including the lessor of the plaintiff, had a continued possession up to a short period before the commencement of this suit, in March, 1851, when the defendant Leary took possession under James, Thomas, and Friley Jones, who claimed the premises upon the death of William Jones, in 1849, without leaving issue surviving. Upon those facts, stated in a case agreed, judgment was rendered *pro forma* in the Superior Court for the plaintiff, and the defendant appealed.

Winston, Jr., for plaintiff.
Moore and Heath for defendant.

RUFFIN, C. J. Without reference to any other point that might be made on the case, it is sufficient to say that the collateral warranty of William Jones, descending on his brothers, who were his heirs, bars them. *Flynn v. Williams*, 23 N. C., 509. It is an artificial (227) and hard rule, the practical operation of which, at this day, is to enable one man to sell another's land without compensation, directly or indirectly, which is not agreeable to the reason and justice of modern law. But it is nevertheless the law, because it was undoubtedly so anciently, and the Legislature has not seen fit to alter it; for it is not within the Statute of Anne, Rev. Stat., ch. 43, sec. 8, and, as far as is

seen at present, it is the only instance under our law which is not within that act; for, as estates tail under the act of 1784, *eo instanti* the tenant becomes seized, are turned into fees absolute, the conveyance of the tenant passes that estate and the land, and consequently a warranty is useless. But the present case is not within the Statute of Anne, because William Jones was not simply tenant for life nor entitled to the bare right to the inheritance, but had the fee simple in possession at the time he entered into the warranty. It is true, his fee was defeasible by way of conditional limitation, upon his dying without leaving surviving issue. But it was not the less the fee, and he was not liable for waste or for forfeiture by making a conveyance of the fee. He had an estate to him and his heirs in possession, with an executory devise over in fee; and consequently his warranty is not one of those made void by the act, as the warranty of an ancestor who had no estate of inheritance in possession of the land.

PER CURIAM. Affirmed.

NOTE.—Dissenting opinion of PEARSON, J., *post*, 408.

Doubted: Motts v. Caldwell, 45 N. C., 291.

Overruled: Myers v. Craig, 44 N. C., 172; *Gaither v. Walton,* 60 N. C., 360; *Southerland v. Stout,* 68 N. C., 450; *Board v. Henderson,* 126 N. C., 698.

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(228)

DENNIS GRADY v. THOMAS THREADGILL ET AL.

1. In a forthcoming bond it is not necessary to insert the names of the parties at whose instance the executions levied on the property have issued.

2. The obligors in a forthcoming bond are not discharged because the return day of the executions levied is before the day on which, by the terms of the condition, the property was to be delivered, though no new executions were issued.

3. No form is prescribed by our act of Assembly for a forthcoming bond, and a condition that the property shall be forthcoming or be delivered at the time and place of sale is sufficient.

4. To enable a plaintiff to maintain an action on a forthcoming bond, it is not necessary for him to have paid the amount of the executions to the plaintiffs therein.

5. The omission to deliver to the surety in the forthcoming bond a descriptive list of the property levied on does not render the bond void. It is a privilege of the surety, and he may waive, or not require it, if he thinks proper.

GRADY *v.* THREADGILL.

APPEAL from *Bailey, J.*, at Fall Term, 1851, of ANSON.

DEBT on a forthcoming bond, and on oyer prayed and had, the defendants pleaded general issue, illegal consideration, and that the bond was not taken according to law, and therefore void. A copy of the bond, marked A, accompanies and forms a part of this case.

The defendant did not produce the negroes mentioned in the bond on the day mentioned in the bond, or afterwards, and plaintiff, who was a constable, in support of the breaches alleged and in proof of damages, offered in evidence several judgments and executions obtained before a justice of the peace, levied on the slaves mentioned in the bond, none of which judgments and executions, except two, were particularly named in the bond; but it was insisted on the part of the plaintiff that the word "others" in the bond allowed him to introduce them. This was objected to by the defendants, but allowed by the court. It (229) was further objected by the defendants that none of these papers could be offered in evidence without further proof of their having been in plaintiff's hands at the time of the execution of the bond than plaintiff's own return upon each execution that he had levied upon the three negroes mentioned in the bond, and his possession of the papers at trial, except as to those mentioned by name in the bond, and that as to any others there must be other proof of their having been levied on the negroes besides plaintiff's own return. It was further objected that the return day of some of these executions was before 10 July, 1848, when, according to the terms of the bond, the negroes were to be delivered, and there was no evidence that the said executions had ever been returned or renewed, after 1 July. And it in fact appeared that some of these executions bore date on 1 April, and some of them on the 8th, and that they never were renewed or returned by the plaintiff or any other officer before any justice of the peace.

It was further objected on the part of the defendants that the condition of the bond was not conformable to the act of Assembly, and was therefore, according to the decision in *Denson v. Sledge*, 13 N. C., 136, void, and could not, therefore, be enforced. It was further objected that the plaintiff could not maintain an action of debt on this bond and recover, without proof that he had actually paid the money to the plaintiff in the executions, or been otherwise actually damaged before bringing his action. It was further objected that the plaintiff could not recover, as he had not proceeded according to act of Assembly, by furnishing a list to the securities under his hand and seal of the property levied on. But all these objections were overruled by the court. Defendant then offered to prove that the same negroes were levied on and sold by the sheriff of the county, under executions of a (230)

teste anterior to plaintiff's levy, in mitigation of damages, which was objected to by the plaintiff and excluded by the court. A verdict and judgment having been rendered for the plaintiff, the defendant appealed.

(Copy of Bond A, referred to in the case.)

STATE OF NORTH CAROLINA—Anson County.

Know all men by these presents, that we, Thomas H. Threadgill and George Allen, all of the county of Anson, are held and firmly bound unto Dennis Grady, constable of our said county, in the sum of fifteen hundred dollars ($1,500) current money of this State, to the whole payment of which well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 10 day of June, 1848.

The condition of the above obligation is such that, whereas the said Dennis Grady, constable, hath levied executions at the instance of John Smith and son, Wilkins & Leak, Jacob Hubbard and others, on certain property, consisting of three negro slaves, named Moses, Watt, and Adeline, and which said property, at the request of said Thomas Threadgill, is left in his own care and possession until the same shall be sold: Now, if the said Thomas Threadgill shall well and truly deliver the said property hereinbefore mentioned to the said Dennis Grady, constable, at the courthouse in Wadesboro, on or before 10 day of July next, without damage or further hindrance, then this obligation to be void; otherwise, to remain in full force and virtue.

THOS. H. THREADGILL. [SEAL]
G. ALLEN. [SEAL]

Signed, sealed and delivered in presence of
W. ALLEN.

(231) *Winston for plaintiff.*
Strange for defendants.

PEARSON, J. As the bond was taken at the instance of the defendants, it would be a matter of regret if, by reason of any defect or technical objection, it should fail to answer the purpose of protecting the plaintiff. None of the many exceptions, however, are tenable.

1. We are satisfied that by a proper construction the word "others" was used in the sense of other persons, at whose instance executions were levied, and not in the sense that "Jacob Hubbard and others" are plaintiffs in a single execution, for to say nothing of the rule that words are to be taken most strongly against the obligors, as the words are *used by*

them, this restricted sense would make only their judgments each within the jurisdiction of a single justice; and yet their negroes were levied on, and the penalty of the bond is $1,500, which would make an inconsistency on the face of the bond. But further, the statute does not require the executions to be particularly named and set forth in the bond; it is mere matter of recital, and, although the obligors may reasonably insist upon having the executions there set out, it is only as a precaution against the fraud of the officers, and because it will operate as a restriction of their liability; but, like a recital in a sheriff's deed, it is not of "the essence," and the omission to insert them does not impair the legal effect and validity of the instrument.

2. The return of the plaintiff was proper evidence as to the executions that were in his hands and had been levied by him at the date of the forthcoming bond. A constable, like a sheriff, is a *sworn* officer, and his return is *prima facie* evidence, and is taken to be true until disproved.

3. Personal property is vested by the levy in a constable or (232) sheriff for the purposes of the execution, and he has a right to go on and sell, after the return day, without any other writ. So the fact that the return day of several of the executions happened to be before the day on which, by the terms of the condition, the property was to be delivered, and it did not appear that new executions were taken out, could not have the effect of discharging the obligors, for the plaintiff had made himself liable to the creditors by his levy, and the property thereby vested in him, and gave him a right to require that the defendants should deliver *his property* to him and leave it forthcoming at the time agreed on.

4. The condition of the bond does conform to the act of Assembly. No "form" is given in the act, and our interpretation of it is that the condition should be for the forthcoming of the property at the time and place of sale. Mr. Strange says the words, "to answer the said executions," ought to have been added, so as to give the obligors the right to pay up the executions prior to the day of sale, and thereby save the condition of the bond. We apprehend a satisfaction of the executions would have precisely the same legal effect, whether these words are added or not; this conclusion is confirmed by the fact that they are not used in the act of 1844, and the condition, as expressed twice in that statute, is simply for the forthcoming of the property on the day of sale.

5. To enable the plaintiff to maintain this action it was not necessary for him to have paid the amount of the executions to the plaintiff therein. Officers would not be disposed to take forthcoming bonds if, upon default of the obligors, there was no right of action for damages until the amount of the execution had been satisfied by the obligors.

(233) The taking of these bonds was not compulsory, and such a construction would make it unreasonable to expect any officer ever to take one, and the policy of the statute, which was to induce officers to take them for the convenience of debtors, would have been completely frustrated.

In pursuance of this policy, in 1822, an act amending the act of 1807 was passed, which provided a summary remedy on these bonds at the next term of the county court, on motion, for all such damages as the officer had sustained, or be "*judged liable to sustain.*" This remedy is cumulative, and no reason can be conjectured why the officer may not recover in an action of debt upon the same proof that will enable him to recover on motion.

6. The act of 1844 makes it the duty of the officer to furnish the security with a list of the property levied on. This does not seem to be made, or intended to be, a condition precedent to the execution of the bond, so that the omission to do it would not make the bond void and of no effect. We have given to the statute much consideration, and have come to the conclusion that the meaning is simply to confer upon the security the right to require the officer to give him such a list, "duly attested under his hand and seal," with the intent that the property should thereby be deemed in the custody of the security, as the bailee of the officer, so as to enable him to prevent other officers from levying on it and taking it away. This right the security may, of course, waive; and if he does not see proper to require such a list to be furnished to him, he cannot afterwards take advantage of his own folly as a ground on which to avoid *his deed*. Our conclusion in regard to the construction of this statute is fortified by considering the *mischief* which (234) it was the object of the statute to remedy. It had been decided that when the property was left in the possession of the debtor, another officer might make a levy and take it away, whereby the security on the forthcoming bond was unable to deliver the property and was fixed with the damages. Of course, it became difficult to procure securities upon a forthcoming bond, and, therefore, the Legislature, carrying out the same benevolent policy of the act of 1822, inducing officers to take such bonds for the purpose of inducing others to become security, provided that the security should have a right to require the officer to give him a list of the property under his hand and seal, which would protect it against other officers, except that they might put their levies "on the backs" of the former levies.

7. The fact that the negroes were afterwards levied on and sold by the sheriff under executions of a teste anterior to the plaintiff's levy has no tendency to mitigate the damages. "The teste anterior to the plain-

tiff's levy" did not relieve him from liability to the creditors in whose favor he held the executions which he had levied upon the negroes, and under which he had the right and it was his duty to hold them, even against the sheriff, with executions of prior teste.

This is his ground of complaint: "At your request, I did not take the negroes into my possession and keep them, as I had a right, and as in duty to the creditors, whose executions I had levied, I was bound to do. If I had done so, the sheriff had no power to touch them; they are not forthcoming, according to the condition of your bond, upon whom shall the loss lie?"

PER CURIAM. No error.

(235)

THOMAS FAUCETT v. PETER ADAMS.

Where a debtor, who is imprisoned at the instance of his creditor, has no property in this State out of which the prison fees and provisions and his support can be satisfied, notwithstanding he may have sufficient in another State, the jailer has a right to recover the amount from the creditor, under Rev. Stat., ch. 58, sec. 6, making him responsible, *"if the prisoner be unable to discharge them."*

RUFFIN, C. J., dissenting.

APPEAL from *Ellis, J.*, at Fall Term, 1851, of ORANGE.

The case agreed is in the words and figures following, to wit:

The following facts are agreed upon by the parties. One Fleming was committed in due course of law as a debtor in execution, at the instance of Boaz Adams, to the custody of James C. Turrentine, as sheriff of Orange, and he delivered the said Fleming to the plaintiff Faucett, the jailer of said county, 26 November, 1839, and he remained in close prison until the night of 1 November, 1844, when he made his escape by his own act, assisted by some one from the outside of the prison, by cutting through the iron bars of the window, but without the knowledge or consent or actual negligence of the plaintiff. In order to provide for the legal charges and expenses of the jailer for keeping or maintaining the said Fleming as a prisoner under the said commitment after the first twenty days, an obligation, a copy of which marked A is hereunto annexed, was taken by the plaintiff from the said Boaz Adams. Said Fleming filed his petition for a discharge under the act of 1798, which was heard in prison on 20 December, 1839, and the prayer of the petition was refused, and he was adjudged to remain in prison.

The judgment of the said Boaz Adams against Fleming, under which he was committed as aforesaid, was obtained at May Term, 1839, of Orange County Court. It is further agreed that the negroes and (236) other property of Fleming aforesaid were then sufficient to pay off the plaintiff. Said judgment was carried to the Western District of Tennessee in the fall of 1838, or as early as 1 March, 1839, and taken from thence to Texas, in the fall of 1839; that the said negroes were in the possession of Fleming's children, as divided amongst them last year (June, 1850) by commissioners appointed for that purpose. A judgment was obtained by the plaintiff against Fleming at May Term, 1844, of Orange County Court, for $519.60, being the prison fees due up to the issuing of the writ in that case, and execution of *fi. fa.* issued thereon to the county of said Fleming's residence, and was returned, "No property to be found." Faucett's account in jail till the escape. He acted as jailer. In the present case a verdict has been rendered for the plaintiff, subject to the opinion of the court upon the facts above stated. If the court should be of opinion with the plaintiff, judgment is to be given in accordance with the verdict; if otherwise, judgment of nonsuit is to be entered.

The following is a copy of the bond referred to:

We promise to pay to Thomas Faucett, jailer, etc., all such prison fees and charges as he may by law be entitled to by reason of the imprisonment of Mordecai Fleming in the public jail of Orange at the instance of Boaz Adams.

In witness whereof, we have hereunto set our hands and seals, this 20 December, 1839.

B. ADAMS. [SEAL]
Test: JOHN A. GILMER. P. ADAMS. [SEAL]

Norwood and J. H. Bryan for plaintiff.
Gilmer for defendant.

PEARSON, J. By Revised Statutes, ch. 105, sec. 37, jailers are allowed for finding each prisoner food, etc., 30 cents per day. By ch. 38, sec. 6, "Whenever a debtor shall be actually confined within the walls of a prison, it shall be the duty of the jailer to furnish said prisoner (237) with necessary food during his confinement, should he require the same, and the jailer shall be authorized to demand the same fees therefor as are allowed by law for keeping other prisoners, and may, *if the prisoner be unable to discharge them*, recover the same from the party at whose instance such debtor was confined in jail. And when the debtor shall have remained in jail for the space of twenty days, it

shall be lawful and sufficient for the sheriff or jailer to give notice thereof, and to demand security of him for the prison fees that may arise after the expiration of twenty days; and if he shall fail to give such security, then to discharge such debtor out of custody." It was argued by Mr. Bryan with much force that, as the jailer is required to furnish food daily, and is allowed *thirty cents per day* by a proper construction of the statute, he has a right to require the creditor, who has given security for the prison fees, to pay up from day to day, or that, properly, the bond which he gives should be on condition to pay the prison fees at such times as the parties may agree on, say, at the end of each week or month or six months; for it is unreasonable that there should be no right to require payment until the expiration of the imprisonment, as that might last for many years, even until the death of the prisoner, during which time many jailers have gone out of office, and certainly, whoever was jailer would find it inconvenient to advance money out of his own pocket in discharge of a duty required of him by law, if the time of repayment was indefinite. We are inclined to adopt this construction, but will not do so, definitely, as we prefer to put the decision on another point. Again it is said, by giving the security the defendant concluded the question as to the debtor's ability to pay the prison fees, for he was not bound to do so except upon the supposition of the debtor's inability; and after acting upon that supposition, whereby he took from the jailer the right to discharge the debtor out of custody, and in that way relieving himself from the burden of his support, it is (238) not consistent with fair dealing afterwards to turn round and say, "He was able to pay the prison fees, and I will not be bound by my obligation"; because, if he intended to make that issue, he ought to have done so, whereby he, refusing to give the bond, the jailer could have discharged the debtor "by taking the responsibility." There is some force in this view of the question, also, but we pass it by.

What is the meaning of the words, "if the person is unable to discharge the prison fees"? We think the true construction is, if he has no property or friends *within the State* out of which the money can be collected by any process which our courts of law or of equity have power to issue. But in the present case the debtor had no property or friends *within this State* out of which he could have raised the amount, even if he had been disposed so to do.

It is true, there were certain slaves which the debtor had caused to be run off to Texas, and *possibly* the plaintiff, by instituting proper proceedings in Texas, might have been able to collect the amount of the prison fees. But it is certain it would have cost him ten times the amount, and it is also certain that to require a jailer to support a debtor at his

own expense, or to follow his property to Texas, California, or China, would be a most unreasonable imposition upon the public officer; and we think the Legislature never intended it. If the jailer cannot force him to pay by any process of any of our courts, because he has nothing within the jurisdiction of this State, then, in the language of the statute, he is "unable to pay."

The question whether a jailer would forfeit his right to be paid his fees if he opened the door and let the prisoner walk out, is not presented by this case, for it is agreed there was no actual negligence on the part of the plaintiff.

Of this opinion was also NASH, J. RUFFIN, C. J., dissented.

PER CURIAM. Affirmed.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1852

STATE v. WARREN AUMAN.

1. In a proceeding in bastardy, returned to the court, the following entry was made: "Compromised. Defendant enters into bond and is to pay all costs." And judgment was rendered that the defendant pay $20 *instanter* to E. L., the mother: *Held*, that this was a judgment of the court, which could not be set aside at a subsequent term at the instance of the defendant.

2. *Held* further, that on appeal to the Superior Court from the order in the county court setting aside such judgment, the Superior Court cannot enter judgment *de novo* for the $20, but must issue *a procedendo*.

APPEAL from *Caldwell, J.*, at Fall Term, 1851, of RANDOLPH. (242)
The case is stated in the opinion of the Court.

Attorney-General Mendenhall and J. H. Bryan for the State.
Winston for defendant.

NASH, J. The case is as follows: The defendant was charged by the State with being the father of the bastard child of Elizabeth Luther. The warrant bears date 16 September, 1848, and was duly returned, and the defendant bound over to the county court. At February Term, 1850, of the court the following entry is made: "Compromised. Defendant enters into bond and is to pay all costs." And at the same term judgment is granted against the defendant for $20, to be paid *instanter* to Elizabeth Luther. At May Term, 1851, a notice was returned into court notifying the mother of the child that a motion would be made at that term by the defendant to set aside the allowance made in her favor against him for the support of her bastard child, with which he was charged. At August Term, 1851, the court adjudged that the order making the allowance should be set aside. An appeal was then taken by the attorney for the State; and in the Superior Court it was adjudged that the county court erred in setting aside the judgment in favor of the plaintiff, upon the ground that they had no power to do so. The court then proceeded to give a judgment against the defendant for the $20 and the costs.

In reversing the judgment of the county court, his Honor committed no error. The county court had no such power. Elizabeth Luther had charged the defendant on oath with being the father of her bas-
(243) tard child, then born, and he had confessed it and given bond according to law. The court had adjudged the facts so to be. It then became their official duty to provide for the maintenance of the child, and to pass such orders as would secure the county from being charged. Accordingly, the court made an order that the defendant should pay the mother of the child $20. This was a judgment which the court had no power to deprive the woman of, it being the judgment of a court of record, regularly made. If the court had the power claimed for it, we see no reason why they should not have the power, on motion, to set aside any judgment at any subsequent term, upon being satisfied that it was founded on a mistake, either in a matter of law or fact. His Honor, however, erred in giving judgment for the $20. A judgment for that allowance already existed in the county court, and all he could do was to order a *procedendo* to that tribunal to proceed to execute the law.

The judgment of the Superior Court for $20 against the defendant is reversed; and the judgment is affirmed as to the power of the county court to rescind the order of February Term, 1850, and as to the costs.

The Superior Court of Randolph will issue a *procedendo* to the county court.

PER CURIAM. Reversed.

(244)

STATE v. WILLIAM BOON.

1. In burglary there must be a breaking, removing, or putting aside of something material which constitutes a part of the dwelling-house, and is relied on as a security against intrusion. A door or window left open is no such security. But if the door or window be shut, it is not necessary to resort to locks, bolts, or nails. A latch to the door or the weight of the window is sufficient.

2. When a man burglariously entered a room where a young lady was sleeping, and grasped her ankle, without any attempt at explanation when she screamed, this is some evidence of an attempt to commit a rape, and must be submitted by the court to the jury.

APPEAL from *Ellis, J.*, at Spring Term, 1852, of SAMPSON.

The prisoner was indicted for a burglarious entry into the dwelling-house of one John Owen, in the county of Sampson. The indictment contained two counts. In the one it was alleged that the intent was to commit a rape upon Sarah Ann, the daughter of said Owen; and in the

other, to commit a rape upon Sarah Eliza Owen, the granddaughter of said Owen.

Sarah Ann swore that she retired early to bed in a shed room of the dwelling-house of her father, in company with her niece, Sarah Eliza, on the night of 21 December, 1851. The girls slept in the same bed. Previous to retiring they examined the room, and were satisfied no one else was there. Shortly after getting to sleep she was awakened by feeling some one touch her foot, and saw some person in a stooping position by the bedside. The person grasped her ankle, when she screamed, and she recognized the prisoner retreating and escaping by the window. She was well acquainted with him. He had married a servant of her father's, who lived on the premises, but she had not seen him for some days. There had been fire in the room, and the embers on the hearth gave sufficient light to enable her to dis- (245) tinguish an individual. She had locked the door. The window was down when she went to bed, but the fastenings were not on. It was usual to fasten it down with a nail, which would prevent any one from without from raising it. When she arose the window was up, and was held up by a stick. It was not the usual sleeping apartment of the witness. She had not slept there for six months previous. It was usually occupied by one Mrs. Faircloth.

Sarah Eliza Owen testified in all respects as her aunt, except that she was not well acquainted with the prisoner, although she had seen him often. She was not positive, but said she *took* the person to be the prisoner.

John Owen swore that he was awakened on the night in question, about 10 o'clock, by the screams of his daughter, and upon going to her room, received substantially the account of the affair as testified to above. He took a light and searched the premises, but could not find the prisoner nor any one else. He did not go to the prisoner's wife's house to see who was there—all was dark and silent. He did not afterwards see the prisoner until he was arrested.

His Honor charged the jury that they must be satisfied that it was the prisoner who entered the dwelling-house of Owen, and that he entered with an intent to commit a rape upon the person of Sarah Ann Owen, or of Sarah Eliza Owen, and that if they were satisfied of one or both of these allegations, they should find the prisoner guilty. Prisoner's counsel prayed the court to charge the jury that there was no evidence of either intent as charged in the bill of indictment; that if the window was usually fastened by a nail or otherwise, and that upon the night in question such fastening was omitted, although the window might have been down, the entry would not have been burglarious, and the prisoner would be entitled to their verdict.

(246) His Honor refused so to charge. There was a verdict of guilty, and a rule for a new trial was had and discharged; and, judgment having been pronounced, an appeal was prayed and allowed.

Attorney-General for the State.
W. Winslow for defendant.

PEARSON, J. The exception, in reference to the breaking, is settled against the prisoner by the authorities. Passing an imaginary line is a "breaking of the close," and will sustain an action of trespass *quare clausum fregit*. In burglary more is required; there must be a breaking, removing, or putting aside of something material, which constitutes a part of the dwelling-house and is relied on as a security against intrusion. Leaving a door or window open shows such negligence and want of proper care as to forfeit all claim to the peculiar protection extended to dwelling-houses. But if the door or window be shut, it is not necessary to resort to locks, bolts, or nails; because a latch to the door and the weight of the window may well be relied on as a sufficient security. Chimneys are usually left open, yet if an entry is effected by coming down a chimney, the breaking is burglarious.

The motion in arrest of judgment, based on the distinction between felonies at common law and those created by statute, cannot be sustained. There seems to have been a doubt upon the question at one time, but the later authorities do not leave it open to discussion.

The exception in reference to the want of evidence of the felonious intent presents the only question as to which we have had any difficulty. The evidence of the intent charged is certainly very slight, but we cannot say there is no evidence tending to prove it. The fact of the (247) breaking and entering was strong evidence of some bad intent; going to the bed and touching the foot of one of the young ladies tended to indicate that the intent was to gratify lust. Taking hold of—"*grasping*" (as the case expresses it)—the ankle, after the foot was drawn up, and the hasty retreat without any attempt at explanation, as soon as the lady screamed, was some evidence that the purpose of the prisoner, at the time he entered, was to gratify his lust by force. It was, therefore, no error to submit the question to the jury. Whether the evidence was sufficient to justify a verdict of guilty is a question about which the Court is not at liberty to express an opinion.

PER CURIAM. No error.

Cited: S. v. Willis, 52 N. C., 191; *S. v. McBryde*, 97 N. C., 398, 401; *S. v. Fleming*, 107 N. C., 907.

WILLIAM AVERA, JR., v. WILLIAM SEXTON.

1. What amounts to negligence is a question of law. And the plaintiff is entitled to special instructions upon certain facts presented by the testimony, or "upon the whole case," if he choose to subject himself to the disadvantage of having all the conflicting evidence taken against him.

2. It is error to refuse such special instructions when called for, and to submit the matter to the jury with general instructions merely.

APPEAL from *Settle, J.*, at Special Term, February, 1852, of CUMBERLAND.

Case to recover damages from the defendant for negligence in (248) managing and steering his raft in the Cape Fear River, by which an unfinished raft of the plaintiff was broken from its fastenings and the timber lost.

Plaintiff called as a witness James Colvill, who swore that he was employed by the plaintiff to watch a raft of timber which he was making in the river, and guard it from the dangers of a freshet. The witness stated that the clamp or unfinished raft was tied to a tree on the shore by an inch rope. In consequence of a high freshet—a rise of 20 feet of water, which came very suddenly in the river—he went to the landing on the morning of the day the clamp was broken, and securely fastened the same by an inch rope to a tree higher up the bank. At a late hour of the day he went again to the river and found the plaintiff's timber gone, and saw upon the trees, where the rope had been tied, the mark made by the rope, as if it had been violently strained. The witness further stated that the clamp was in a cove, made by a bed in the river; was at a public rafting and landing place, a place where raftsmen coming over the falls or rapids were accustomed to stop for the purpose of discharging the extra hands necessary to bring the raft over the falls. He further said that there were 24 sticks of timber in plaintiff's clamp.

Plaintiff next examined Kedar Kennedy, who swore that he came over the falls on the day plaintiff's timber was lost, and tried to *"take up"* his raft at the *"upper landing,"* next to the falls; failing in this, he followed the current until he came within 80 or 100 yards of the "cove," when, seeing a clamp or raft of timber at the place described by the first witness, he ordered his hands to "pull out" and not to strike it. He then ran with the current about two miles, until he came into "eddy water" and took up his raft. He stated that he could see plain- (249) tiff's raft at the distance of 80 yards, and could easily avoid striking against it, after seeing it at that distance. He further stated that the current of the river set in a direction off from plaintiff's timber, and was sufficiently strong to carry off a raft, if no effort had been made to draw it into the shore.

Thomas Bolin was next introduced, who swore that he was on defendant's raft the day the plaintiff's clamp was broken; said that the clamp might have been seen at the distance of 75 yards, but was not seen at that distance; that he was standing upon the raft, near the front, not employed at the time; that most of the hands were working to get the raft in near the shore for the purpose of "taking up"; that so soon as the alarm was given about the clamp ahead, the hands commenced working the fore oar for the purpose of throwing the head of the raft out into the main stream, so as not to *"butt"* the plaintiff's timber; that the front of the raft, being thrown suddenly out, caused the stern to wheel in, which "dragged" or "rubbed" the plaintiff's timber, and caused the clamp to be broken, and the pieces scattered in the current. Witness further said he thought all was not done that might have been done to prevent the injury to the plaintiff.

Plaintiff gave evidence of the value of his timber, and closed his case.

The defendant, to support his plea of "not guilty," examined first James McAllister, who swore that he had been many years acquainted with rafting and "navigating" the falls; that on this occasion he went on defendant's raft at his request and assisted the hands in going over the falls; that there were ten or twelve hands on the raft, more than the number usually employed in the highest freshet; that they were safely over the falls, and drew in towards the shore, trying to take up, and were trying for half a mile—throwing out their ropes around
(250) trees and catching the limbs; that when the alarm was given about the timber ahead at the landing, the main force was applied to the fore oar to throw the head of the raft out into the stream and to avoid a collision with plaintiff's clamp; that a part of the hands were also working at the "hind oar" to prevent its dragging or rubbing; but as soon as the front of the raft passed by the plaintiff's without striking, an effort was made by the hands to throw out the stern towards the current, so as to prevent striking either with the side or end of defendant's raft; but they failed in this, and the clamp was broken loose by the hind end of the raft. He further swore that the force of the hands was sufficient; that some of them were trained and experienced in the management of rafts, and that all was done that could be done, after seeing plaintiff's timber, to prevent its loss. Says that he was within 50 yards of the clamp when he discovered it; that he might have passed by it safely had he seen it a distance of 75 or even 50 yards. No hand is ever employed on the river merely as a "lookout." He further swore that the force of the hands was properly directed, and that not only was the proper effort made, but in his opinion the whole management of the raft was skillfully conducted. He further swore that he was looked up

to as the manager of defendant's raft; that at the time of the "alarm" he ordered all hands to the fore oar, which he admitted to be wrong in ordering *all hands*. He further said that negro Frank, an experienced hand, remained at his post at the hind oar, notwithstanding the order.

Hugh McLean swore for the defendant: Was also upon the raft. Swore in all material points substantially as the witness McAllister. He said that when plaintiff's clamp was discovered, he and several others were clinging to the limbs and bushes, trying to take up the raft of the defendant, and that as soon as the clamp was seen, they (251) immediately made all the efforts in their power to prevent injury. He further swore that there was no lookout on the raft; that he never heard of a "lookout" on the Cape Fear; that plaintiff's raft might have been seen by a lookout.

Julius McLean, witness for defendant, was also on defendant's raft. Swore in all material matters as the other witnesses for defendant. He said that Bolin, McAllister, McLean, defendant, and himself were the only white persons present on defendant's raft.

His Honor charged the jury that the defendant, being in the prosecution of a lawful employment, was only bound to use ordinary care—such care as an ordinarily prudent man would use in the management of his own affairs. And if, in this matter, he did not use such care, the plaintiff was entitled to the verdict.

Plaintiff's counsel then requested the court to charge the jury that if the defendant, when attempting to "take up," saw the raft of the plaintiff, or might by a careful lookout have seen it, it was his duty in taking up to have taken effectual efforts to have prevented a collision.

His Honor would not so instruct the jury, but remarked that the defendant was only bound to use ordinary care, and what that was he had already explained.

Plaintiff's counsel then prayed the court to instruct the jury that, upon the whole case, if they believed the testimony, there was negligence on the part of the defendant; but the court declined so to instruct the jury, and repeated the instructions as to ordinary care.

Verdict for defendant, and plaintiff appealed.

W. Winslow for plaintiff.
Strange for defendant.

PEARSON, J. Plaintiff's counsel prayed his Honor to instruct the jury that upon the whole case, if they believed the testimony, there was negligence on the part of the defendant. This instruction was refused, and for this the plaintiff excepts. (252)

The terms used by the plaintiff are so general as to impose on him the disadvantage of having all the testimony, where it conflicts, taken against him. But even with this allowance, there was negligence on the part of the defendant.

Plaintiff's unfinished raft was fastened at a usual landing place, where rafts were sometimes constructed, and descending rafts were frequently taken up. It could be seen by the hands on a descending raft at the distance of 75 or 80 yards; and they could without difficulty avoid a collision if it was seen at any time before coming within 50 yards. The defendant, *without looking* to see whether the landing was preoccupied, as there was reason to suppose it might be, approached so near that when the plaintiff's raft was seen it was too late, and the collision was inevitable. These are the facts. They establish negligence and fix the defendant with a liability to make compensation for the damage.

Common prudence requires, and, in fact, it would seem to be a natural impulse, that one on a descending raft, before deciding to "take up" at a usual landing place, should look and see whether it was preoccupied, as soon as he came to a position from whence the fact could be ascertained, and, at all events, before coming so near that seeing could do no good, and the consequences be the same as if he had not looked at all, but having decided to "take up" at that place, approached blindly and without regard to the damage he might cause to others.

If plaintiff's raft had been in a position from which it could not be seen in full time to avoid a collision, it might have been his duty to keep a hand there or fix up a signal in order to give notice; but such was not the case, and the entire fault was on the part of the defendant.

(253) What amounts to negligence is a question of law. This is settled by numerous cases. And the plaintiff was entitled to special instructions upon certain facts presented by the testimony or "upon the whole case," if he chose to subject himself to the disadvantage above pointed out. Consequently, it is error to refuse such special instructions when prayed for, and to submit the matter to the jury "broadcast," with the general instruction that "the plaintiff was entitled to recover if the defendant did not use such care as an ordinarily prudent man would use in the management of his own affairs."

PER CURIAM. *Venire de novo.*

Cited: Hathaway v. Hinton, 46 N. C., 246, 247; *Brock v. King*, 48 N. C., 48; *S. v. Allen, ibid.*, 264; *Woodward v. Hancock*, 52 N. C., 386; *Pleasants v. R. R.*, 95 N. C., 203; *Emry v. R. R.*, 109 N. C., 592, 597, 612; *Cable v. R. R.*, 122 N. C., 895; *Thomas v. Shooting Club*, 123 N. C., 288; *Cox v. R. R., ibid.*, 607; *Coley v. R. R.*, 129 N. C., 413.

STATE TO THE USE OF DEMSEY HARRELL v. LEVIN LANE.

To show that a person was a constable it must appear that he was elected by the people as prescribed by act of Assembly (Rev. Stat., ch. 24), or was appointed by the court to supply a vacancy, as provided by the said statute.

APPEAL from *Bailey, J.*, at Fall Term, 1851, of NEW HANOVER.

Debt on a bond of one Gregory, who was appointed a constable at December Term, 1838, by the County Court of New Hanover. (254) This bond was declared on as a lost bond, and it was alleged to have been executed by the defendant through a power of attorney to Joshua Wright, Esq., also alleged to be lost. In proof of the execution and loss of the bond and power of attorney, the plaintiff offered in evidence the deposition of Thomas F. Davis, deceased, the former clerk of the County Court of New Hanover. He also offered James T. Miller, who heard the said Davis examined on a former trial of this cause in the county court, and who stated that the said Davis, among other things, testified on the said trial that he, the said Davis, witnessed the execution of the said bond by the defendant through Joshua G. Wright, under a power of attorney from him to the said Wright; and the said bond and power of attorney were filed away in his office, and he had since seen them there; that a fire had taken place, in which many of the papers and records in his office had been thereby consumed; and that since that time he had, by request, diligently searched for the said bond, but had been unable to find it. Plaintiff further proved by the present deputy clerk that he had, at the request of the plaintiff, searched among the files in his office for the said bond, but had been unable to find either the bond or power of attorney. Plaintiff assigned as breaches of said bond that several judgments and executions had been placed in the hands of said Gregory by the said Harrell on 17 July, 1839, and that the said Gregory might have collected the same within his official term, but had neglected to do so; and that the said claims had been placed in the hands of said Gregory on 17 July, 1839, and that the said Gregory had collected them on 10 December, 1839, but had immediately absconded, without paying them over to the plaintiff, to wit, on said 10 December, 1839. It appears from the record of New Hanover County Court that the said court commenced its session on 10 December, 1838, and that the date of the appointment and (255) bond of said Gregory was 15 December, 1838.

Defendant objected to plaintiff's recovery upon the ground that there was no evidence of the execution of the power of attorney to Joshua G. Wright, under which it is alleged he acted, and that the same was lost

so as to dispense with its production on the trial. And further, that if the proof of the execution of the bond was complete, the official term of said Gregory had expired before the said claims were put in his hands by the plaintiff, to wit, 17 July, 1839. It was in evidence that said Gregory acted as constable until he absconded in the fall of 1839.

Verdict for the plaintiff set aside and a nonsuit entered, from which judgment plaintiff appealed.

Strange for plaintiff.
W. Winslow for defendant.

NASH, J. This is an action on a constable's bond against his surety. The constable, Gregory, was appointed by the county court at its December Term, 1838. Two breaches are assigned, under neither of which is the defendant liable to the plaintiff's action. The judgments were put into the hands of Gregory by the relator in July, 1839, and the money collected by him in December following.

By the act of 1836, Rev. Stat., ch. 24, sec. 2, constables are directed to be elected annually by the qualified voters in each captain's district, "at any time within one month preceding the first county court held in the several counties after 1 January in each year," etc. By the fourth and sixth sections the county court is authorized to supply such (256) vacancies as might occur by any of the means therein specified, and the persons so chosen are qualified to act until the next election. The case does not show the reason of the vacancy, nor is it important. The court has no power to act except in the cases provided for, and it must be presumed they rightly acted. The appointment of Gregory, therefore, was for the unexpired portion of the constabulary year, namely, from December, 1838, until the next election, in 1839, or until the time when, by law, the election ought to take place, which was at the first county court after 1 January, 1839. When the papers were put into his hands for collection he was not a constable, and his sureties were not bound for his acts. *S. v. Lackey*, 25 N. C., 25; *S. v. Wilroy*, 32 N. C., 329; *Ferrand v. Burcham*, 33 N. C., 436.

PER CURIAM. No error.

Cited: Howell v. Cobb, 49 N. C., 260.

STATE v. ALVIN G. THORNTON.

1. A *nolle prosequi* in criminal proceedings does not amount to an acquittal of the defendant, but he may again be prosecuted for the same offense, or fresh process may be issued to try him on the same indictment, at the discretion of the prosecuting officer. The defendant, however, when a *nolle prosequi* is entered, is not required to enter into recognizance for his appearance at any other time.

2. A *capias*, after a *nolle prosequi*, does not issue as a matter of course at the will of the prosecuting officer, but upon permission of the court first had, and the court will always see that its process is not abused to the oppression of the citizen.

APPEAL from *Dick, J.*, at Spring Term, 1852, of JOHNSTON.

The facts of this case will be found in the opinion of the Court.

Attorney-General for the State.
W. H. Haywood for defendant.

NASH, J. The motion, made in the court below, and upon which the case is brought here, is founded upon a misconception of the principle and effect of a *nol. pros.* entered by the prosecuting officer on an indictment. A bill of indictment was found against the defendant, and a *nolle prosequi* was entered by the Attorney-General, and an *alias capias* was issued against the defendant, under which he entered into a recognizance to appear at the succeeding term. No other bill upon the same charge was sent to the grand jury, and the Attorney-General announced his determination to send no other, but to try the defendant upon the bill then found. This was opposed on the part of the defendant, who moved to be discharged unless the Attorney-General proposed to send another bill against him for the matter charged in the first bill, or for some other alleged crime. The motion was overruled. The objection is founded upon the idea that, although the *nol. pros.* did not discharge the defendant from answering to the charge upon another indictment, it was an effectual discharge from any liability under the bill then found. A *nol. pros.* in criminal proceedings is nothing but a declaration on the part of the prosecuting officer that he will not at that time (258) prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time (1 Ch. Cr. L., 480); but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. 6 Mod., 261; 1 Sal., 21. In *S. v. Thompson,* 10 N. C., 614, the Court

say the Attorney-General has a discretionary power to enter a *nolle prosequi;* and upon his motion the court ought to grant leave to issue an *alias capias*, returnable to the next term. The abuse to which such a power, on the part of the prosecuting officer, is liable, is checked and restrained by the fact that a *capias* after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but upon permission of the court first had; and the court will always see that its process is not abused to the oppression of the citizen. In this case, although the record is silent as to the order of the court for this purpose, we must presume it was made under the principle that what is done by a court, competent to act in the matter, is rightly done.

There is no error in the interlocutory order made in the court below.

PER CURIAM. No error.

Cited: S. v. Swepson, 79 N. C., 641; *S. v. Taylor*, 84 N. C., 775; *S. v. Smith*, 129 N. C., 547; *S. v. Williams*, 151 N. C., 661; *Wilkinson v. Wilkinson*, 159 N. C., 267; *S. v. Smith*, 170 N. C., 744.

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(259)

JOHN C. PRIDGEN, EXECUTOR, v. ETHELDRED PRIDGEN'S HEIRS.

It is sufficient that an attesting witness to a will makes his mark.

APPEAL from *Ellis, J.*, at Spring Term, 1852, of COLUMBUS.

This was an application to prove the last will and testament of Etheldred Pridgen, deceased, in solemn form, which was resisted by the next of kin of the deceased, and an issue of *devisavit vel non* had been made up in the County Court of Columbus and sent into this Court for trial. Upon the trial one of the subscribing witnesses proved the execution and publication of the will, and it appearing that the other witness had made his mark and was not an inhabitant of the State, the executor proposed to prove by the first witness that he saw the other witness make his mark in the presence of and at the request of the testator (which was a common cross mark, as is usually made by an illiterate person). This was objected to by the caveators, but admitted by the court, whereupon the witness swore that at the same time at which he signed the will as an attesting witness, the other witness was called on by the testator to witness his will; that the deceased knew what the will contained, and declared it to be his last will and testament, and that he saw the other make his mark.

There was a verdict and judgment for the propounders, from which the caveators appealed.

Strange for plaintiff.
Troy for defendant.

NASH, J. It is unnecessary to say what would be the judgment (260) of the Court upon the question presented in this case if it were *res integra*. We do not consider it an open question, but one settled by a course of decisions, and not now to be disturbed. Our statute of 1784 is, so far as this question is concerned, the same with the English statute of frauds, of 29 Charles II. The latter directs that all devises of lands and tenements shall be in writing, and *signed* by the testator, etc., and be *subscribed* in his *presence* by three or more witnesses. The same words are used in the act of 1784, as to the act of the testator in executing the will, and as to that of the witnesses in attesting it. The first is to sign it and the others are to subscribe it. The fourth year after the passage of the Statute of Charles, *Lemange v. Stanly,* 3 Levins, 1, was decided; and although it turned upon another question, yet a majority of the Court decided that the word *signum* meant no more than a mark. This is a leading case, showing that, although the statute required the testator to sign the paper, yet, by making his mark, it was complied with. A testator, then, by making his mark, satisfies the requirement of the law. This is admitted in the argument. But it is urged that, although the mark made by a testator is within the act, yet a different word is used as to the attestation of the witnesses, to wit, the word "subscribe." That phraseology, it is true, is used, but we cannot perceive the necessity of altering the construction. Both expressions are used with the same view and to the same end —to protect testators from frauds. The words are nearly convertible terms. Mr. Bailey defines a sign to be a sensible *mark* or *character*—a *subscription* of one's own name; and to *subscribe,* to set one's hand to a writing. If, then, the statute is, on the part of the testator in this particular, complied with by making his mark, why is it not satisfied by the witnesses making their mark? The inconvenience and danger of defeating wills by allowing witnesses to attest them who cannot write have been strongly urged in the argument. On (261) the other hand many evils might grow out of a rule confining the attestation to those only who can write. But, as before remarked, the question is not considered an open one. The opinion expressed by *Lord Hardwick* in *Ellis v. Smith,* 1 Ves., Sr., 17, has always struck me with great force. "I think," says his lordship, "that where things are expressly required by a statute, courts are not to say other things shall be equivalent to them; but I also think authorities established are so many laws,

and receding from them unsettles property, and uncertainty is the unavoidable consequence. To the maxim of *Lord Bacon*, that not the decision, but the ground on which it stands, is to be regarded, I shall oppose the saying of Lord Trevor, a man most liberal in his constructions, that many uniform decisions ought to have weight, that the law may be known; and, to gratify private opinion, established opinions are not to be departed from." Mr. Phillips, 1 Ev., 500, says an attestation by a mark has been adjudged a sufficient subscription within the statute. And Mr. Chitty, in his notes to 2 Bl. Com., 378, recognizes the doctrine. *Harrison v. Harrison*, 8 Ves., 185, is to the same purpose. That was a bill in equity by the devisees against the heirs. The will had three witnesses, only one of whom subscribed his name; the other two made their marks. It was held by the chancellor, *Lord Eldon*, to be sufficiently attested, upon the authority of a case (*Gurney v. Corbit*) tried in the Common Pleas, upon a case agreed, when it was adjudged that an attestation by a mark was sufficient; and the chancellor observes, "Mr. Sergeant Hill says there have been a great many other cases." This case was succeeded by that of *Addy v. Grix*, 8 Ves., 301, decided by *Sir William Grant*, Master of the Rolls. In Iredell on Executors, 16, the same doctrine is stated. In New York, where the Statute of Charles has (262) been adopted, the same principle of construction has prevailed. 1 Johns., 144; *Jackson v. Vanderson*, and 9 Cow., 94, *Jackson v. Phillips*. The law must be considered as settled; and in this State I do not know that it has ever before been questioned; and I think I may safely say a very large portion of the wills that have been admitted to probate have been attested by markmen. It will not do to unsettle the law, upon the ground that the able men who have heretofore adjudged it were mistaken.

PER CURIAM. No error.

Cited: Devereux v. McMahon, 102 N. C., 286; *In re Pope*, 139 N. C., 486.

DOE ON THE DEMISE OF HENRY MASON v. MURDOCK MCLEAN.

No mere possession of land for a period of time less than thirty years will authorize the presumption of a grant.

APPEAL from *Settle, J.*, at Spring Term, 1852, of CUMBERLAND.

The lessor of the plaintiff derived title to the premises by a grant from the State to himself in January, 1846. The defendant gave evidence

that he had been in actual and continued possession of the (263) premises for twenty-four years before this suit was brought, which was in May, 1847; and his counsel prayed an instruction that the jury might therefore presume a grant to the defendant prior to that to the lessor of the plaintiff. But the court refused to give that instruction to the jury, and, on the contrary, directed them that the possession for twenty-four years would not authorize the presumption of a grant. Verdict for the plaintiff, and judgment, and the defendant appealed.

Shepard and Kelly for plaintiff.
W. Winslow for defendant.

RUFFIN, C. J. The judgment must be affirmed. The length of possession required for raising the presumption of a grant from the State has often been the subject of consideration and conference among those who have been judges of this Court at different periods. The great and rapid changes wrought by the care and culture of man in the condition and value of the wild lands of our country, and the consequent propriety of quieting men in their estates, on which they had bestowed their labor sufficiently long to work those changes, early induced the Legislature to render much shorter than they had been the periods at which bad titles should become good, as bars to the entry of a private person or under the State, when such possession was under color of title. The courts, by that example, felt constrained to modify the rule in respect to the presumption of a grant at common law, by allowing that effect to a shorter possession than had been required by our ancestors in England. It was obvious, however, that it was indispensable to fix on some certain *minimum* of possession as necessary to raise the presumption; for, otherwise, there would be no rule as the law of a case, and each question, as it should arise, would rest in the arbitrary discretion of the judge, or in the not less arbitrary but less balanced discretion of the (264) jury. In settling on the *minimum* the judges would naturally resort to the analogies supplied by the legislative action; and, having regard to the provision of the act of 1791, that even a possession under color of title and to known and visible lines must continue for twenty-one years before it would be a bar to the State, it appeared to them that a grant to one who entered apparently as a wrong-doer could not be judicially presumed in less than thirty years. That was finally adopted as the period for which, at the least, there must be a possession in order to establish a grant. Although that precise period was not definitely concluded on at first, and although some particular judge may have entertained a doubt whether the diminution from that at the common law in

England might not perhaps be too great, yet no judge distinctly dissented from it at any time; and since the case of *Candler v. Lunsford*, 20 N. C., 542, the time has been considered fixed at thirty years; for, although the evidence was there of a possession for thirty-five years, the instruction to the jury was that from an uninterrupted possession of thirty years they should presume a grant, and the judgment was affirmed here by the concurring opinion of all the judges. The same period was subsequently specified in *Wallace v. Maxwell*, 32 N. C., 110, and again it was distinctly stated, in *Reed v. Earnhart*, 32 N. C., 526, as the shortest which could authorize the presumption of a grant. The point has never been drawn into question since 1839; and the judges of the Court at present coincide unanimously in opinion on it, which it is thought proper to mention, as it involves a rule of property, and is therefore a point of importance, which makes it fit that it should be known to be judicially settled.

As to leaving the matter to the jury as a presumption of fact on this evidence, according to the prayer of the defendant, that was out of the question. It is difficult to suppose a case in which a grant ought not to be presumed where there has been a possession of a portion of
(265) the public domain for the requisite length of time; and it seems not less difficult to suppose that a jury could be justified in finding that a grant had actually issued, when there was no direct proof of it, and there was not the requisite length of possession. *Bullard v. Barksdale*, 33 N. C., 461. But if the question as to the presumption of the latter kind could arise upon any state of facts, it certainly could not in this case. What was there to submit to the jury? Nothing but the naked fact of twenty-four years possession. And it would be manifest absurdity to leave it to the jury to deduce therefrom a presumption which the court was unable to do, upon the ground simply that the law would not allow of such a presumption from a possession so short.

PER CURIAM. No error.

NOAH WHITE v. JOHN WHITE ET AL.

When A. made a fraudulent deed of trust of certain property to B., and for a fair price and *bona fide* conveyed the property to B.: *Held*, that B. acquired a good title, notwithstanding the previous fraudulent transaction.

(266) APPEAL from *Caldwell, J.*, at Spring Term, 1852, of RANDOLPH.

Trover for a wagon. The plaintiff claimed title to it under a purchase of it and a horse, made by him in May, 1847, from one Thomas White and one Wall, at the price of $135, which was their value. In

September, 1847, the defendant obtained a judgment against Wall before a justice of the peace on a debt, which existed prior to March, 1847, and then had the wagon sold on execution, and became the purchaser. The defense was that the plaintiff's purchase was fraudulent and void as against Wall's creditors. In order to sustain it, the defendant gave in evidence a deed of trust made by Wall to Thomas White, in March, 1847, whereby he conveyed the wagon, two horses, and some other small articles, being all the property he had, in trust to secure certain debts which Wall owed the plaintiff, Noah White, or for which the plaintiff was his surety, amounting altogether, as recited in the deed, to "about $300," with a provision for the sale of the property by the trustee if the debts were not paid in six months. The said Wall was also examined as a witness, and he stated that the amount of the debts secured in the deed was not known correctly when the deed was executed, and that it was supposed $300 would cover them, and that sum was inserted for that purpose; but that, when they were afterwards settled, it was found that they amounted to $177. Thereupon counsel for defendant moved the court to instruct the jury that the deed of trust was fraudulent and void as against defendant, and, if so, that such fraud vitiated the sale from Thomas White, the trustee, and Wall to the plaintiff, in May, 1847, whether such sale were fair or fraudulent. But the court refused to give that instruction, and told the jury that though the deed of trust were fraudulent, yet if the subsequent sale to the plaintiff were in good faith and for a fair price, the plaintiff was entitled to recover. A verdict and judgment were given for the plaintiff, and the defendant appealed.

Gilmer and Miller for plaintiff. (267)
Mendenhall and Bryan for defendant.

RUFFIN, C. J. There cannot be a doubt of the law laid down to the jury. Assuming the deed of trust to have been fraudulent, yet, clearly, the fraudulent grantor and grantee, united, must be able to make a good title; for the title must be in one of them, and unless it could be conveyed, we should have an instance of property perpetually inalienable. A stranger might, therefore, have purchased this property. So might the plaintiff, for a fair price and *bona fide*, which is admitted to be the case here; for the law does not deprive persons of the power of reference, but rather encourages them to abandon covinous conveyances and make honest bargains instead of them. That was done here before the defendant got a judgment against Wall.

PER CURIAM. No error.

Cited: Pollock v. Wilcox, 68 N. C., 48.

THOMAS LATHAM AND D. B. PERRY v. FRANCIS AND JOHN HODGES.

1. An appeal was taken to the Supreme Court, and a final judgment there rendered. A writ of error, *coram nobis*, upon the ground that one of the parties died before the trial in the Supreme Court, cannot be allowed in that court.

2. Error for matter of fact lies only in the court in which the record and judgment are, and not to reverse the judgment of another court, and especially of a higher one.

(268) APPEAL from *Caldwell, J.*, at Fall Term, 1851, of PITT.

Application to the Superior Court of Pitt for a writ of error *coram nobis*, for error in fact on the following case: A paper-writing was propounded in the county court as the will of Martin Woolard, by Hodges as executor, and was contested by Ransom Woolard, and there was sentence for the will. Ransom Woolard took the cause to the Superior Court by *certiorari*, and gave a bond for that purpose, in which Latham and Perry, the present applicants, were his sureties. In March, 1848, the issue was again found for the will, and sentence pronounced accordingly. Then judgment was rendered against Latham and Perry on their bond for the costs, and they appealed to the Supreme Court, where the judgment against them was affirmed, and upon execution the costs were levied. They then made the present application, upon the ground that Ransom Woolard died before the term of the Superior Court at which the trial took place, and in September, 1851, his Honor allowed the application, and the other side appealed.

Rodman for plaintiffs.
Biggs and Donnell for defendants.

RUFFIN, C. J. The parties cannot get at their object in the present mode of proceeding. If they could have entitled themselves to the writ of error for the alleged error of fact, in the Superior Court, it was only while the judgment against them was in the power of that court.
(269) Instead of pursuing that course, however, they appealed to this Court upon the matter of law, so that the judgment finally rendered against them was the judgment of this Court, and not that of the Superior Court. Hence this writ cannot be sustained, as error for matter of fact lies only in the court in which the record and judgment are, and not to reverse the judgment of another court, and especially of a higher one.

PER CURIAM. Judgment reversed, and motion disallowed.

WILLIAM R. BERRYMAN, ADMINISTRATOR OF THOMAS, v. ABEL KELLY.

1. Where one enters under a conveyance of some colorable title for a particular parcel of land, the rule is that possession of part is *prima facie* possession of the whole not actually occupied by another, as the documentary title defines the claim and possession.

2. But it is otherwise when one enters without any color of title, for then there is nothing by which the possession can be constructively extended beyond his occupation.

APPEAL from *Ellis, J.*, at Spring Term, 1852, of MOORE.

Quare clausum fregit, originally brought by Thomas, for breaking and entering a house in his possession. It was revived by the present plaintiff and tried on the general issue. Plaintiff gave evidence that his intestate was seized in fee of a tract of land on which the house was situated, and that a person resided therein until March, 1845, who then surrendered the possession of the premises to a son of Thomas for his father, and went away; and that the son, as the agent of (270) his father, took possession and nailed up the doors and windows of the house, having in it a few turnips and potatoes belonging to the outgoing tenant. About that time, but whether before or after does not appear, the defendant sowed oats in a field, on a tract of land belonging to Thomas, and also plowed another field thereon for Indian corn. It does not appear that the house in question was within either of these fields. In a few days after the house had been shut up, as just mentioned, the defendant committed the act for which this suit was brought, by breaking the doors and windows of the house and entering it, saying at the time that he had given Thomas notice that he would take possession of the house that day.

For the defendant it was insisted that at the time he broke and entered the house the intestate was not, but the defendant was, in possession of the house; and, therefore, that the action would not lie. But the court refused so to instruct the jury, and left it to them to determine, as a question of fact, whether plaintiff's intestate was or was not in possession at the time of the alleged trespass. The jury found for the plaintiff, and the defendant appealed from the judgment.

Kelly for plaintiff.
Mendenhall for defendant.

RUFFIN, J. Beyond doubt, the intestate was entitled to this action for defendant's entry into the house. To say nothing of the actual possession taken by him, through his agent, the possession was construc-

tively in him by reason of his title; for it is settled in this country that the owner of land is deemed in law to be in the possession until it actually be taken by some one else. The argument for the defendant was that he was in possession of the house by force of the fact
(271) that before entering the house he was cultivating two fields on the tract of land, and by reason of the rule of law that possession of a part of a tract of land is possession of the whole. But the rule referred to is misapprehended and does not apply to this case. When one enters under a conveyance of some colorable title for a particular parcel of land, then the rule is that possession of part is *prima facie* possession of the whole, not actually occupied by another, which may be safely acted on, as the documentary title defines the claim and possession. But it is clearly otherwise when one entered without any such color of title, for there is, then, nothing by which his possession can be constructively extended an inch beyond his occupation. This defendant set up no title, and must be taken to be a wrongdoer throughout. Consequently his first possession of the house was constituted by the entry for which this suit was brought. There was, therefore, no error against the defendant, for in law the plaintiff was deemed in possession and entitled to his action of trespass for the original breaking.

PER CURIAM. No error.

Cited: Davis v. Higgins, 91 N. C., 387; *McLean v. Smith*, 106 N. C., 177; *Stewart v. McCormick*, 161 N. C., 627.

(272)

EDMUND S. MOORE v. JOHN R. HYMAN ET AL.

1. To repel the statute of limitations a promise must be either for a sum certain or for that which may be, and afterwards is, reduced to a certainty.

2. A. brought a suit against B. for the amount of 150 barrels of herrings, placed with B. for sale. The statute of limitations was pleaded. B. claimed a discharge for 6 barrels, and as to this the parties disagreed. B. asked A. why he sued. The reply was, "For a settlement." B. said, "We are willing to settle, and always have been willing"; and the matter was then, by agreement, referred to arbitrators, who never decided: *Held*, that the promise, implied in the language used, was uncertain as to the sum, and, that sum never having been ascertained in the mode agreed on, the promise being for an uncertain sum, was too vague to have any legal effect.

APPEAL from *Dick, J.*, at Spring Term, 1852, of MARTIN.

MOORE *v.* HYMAN.

Assumpsit against the defendants, doing business in partnership, on the following receipt executed by them:

Received of Edmund S. Moore 150 barrels of herrings, to be sold for him on commission.

May, 1841. G. W. & J. R. HYMAN.

It was proved that more than three years before the commencement of the suit the plaintiff and defendants had endeavored to settle for the fish sold by the latter, but they did not, because they differed about the number of barrels for which it was alleged by the plaintiff the defendants ought to account. The action was commenced at January Term of the County Court of Martin, 1849. During that term the plaintiff and one of the defendants met in the presence of several persons, and a conversation ensued between them, in which the defendant asked the plaintiff why he had sued him; the plaintiff replied that he (273) had sued him for a settlement. The defendant said he was willing to settle, and had been so at all times. It was then proposed by the defendant to refer the suit to arbitrators; the plaintiff agreed to it, and the defendant said he would choose one arbitrator and the plaintiff another; the plaintiff said the defendant might select both men, and thereupon the defendant selected two men as arbitrators, who were present, who were accepted by the plaintiff and who made no objection to arbitrate it. Plaintiff then stated that he and the other defendant, John R. Hyman, who was not present, had once attempted to settle the matter, and that they differed about 6 barrels of the fish, and that all he had ever received was $100 at one time, and afterwards $70, to which the defendant made no reply. At the next term of the county court the defendant George W. Hyman said he declined to allow it to be arbitrated, and he preferred the suit should take its course.

The judge was of opinion that the statute of limitations, which was pleaded, was a bar to the recovery. The plaintiff submitted to a nonsuit. Rule for a new trial; rule discharged; appeal to the Supreme Court.

Moore and P. H. Winston, Jr., for plaintiff.
Biggs and Rodman for defendants.

PEARSON, J. To repel the statute of limitations there must be a promise to pay the debt sued on, either expressed or implied, and the terms used must have sufficient certainty to give a distinct cause of action, by the aid of the maxim, *"Id certum est, quod certum reddi potest."* *Smith v. Leeper,* 32 N. C., 68. The rule is settled, but the difficulty is in applying it.

Plaintiff relies upon a conversation had with one of the defendants at the term to which the suit was returned, to repel the statute, and
(274) insists that the law will imply a promise to pay his debt, on two grounds: Defendant asked plaintiff why he had sued him. Plaintiff said he had sued him for a settlement. Defendant replied, he was willing to settle, and had been so at all times. The question is, Does the law, with the aid of the above maxim, from this evidence imply a promise to pay the debt sued for?

The word "settle" is sometimes used in the sense of "paying," as if, upon a balance being struck, one says, "I have not the money now, but will call in a few days and settle it." Here a promise to settle is a promise to pay. The word was considered as being used in this sense in *Smith v. Leeper*. At other times "settle" is used in the sense of accounting together and striking a balance by *computation*. When so used, a promise to settle implies a promise to pay the balance; for why settle unless you intend to pay? And this implied promise to pay is sufficient to repel the statute, for, although the amount is indefinite at the time of the promise, yet a mode is agreed on by which it can certainly be ascertained, and the maxim above cited applies. In this sense the word "settle" is used in *Smallwood v. Smallwood*, 19 N. C., 335.

At other times it is used in the sense of adjusting matters of controversy about which there had been a difference of opinion, and striking a balance by agreement. When so used, a promise to settle implies a promise to pay the balance, provided it is agreed on. It is a conditional promise. , The amount is indefinite; a mode is pointed out by which it may or may not be made certain; if it be made certain in that mode, the promise becomes absolute; but if it is not attempted, or is ineffectual, by reason of the disagreement of the parties as to the facts, then the condition being unperformed, the promise is of no force, being a promise to pay an indefinite amount, which cannot be made certain. In
(275) this sense the word "settle" is used in *Peebles v. Mason*, 13 N. C., 367.

The maxim above cited applies only when the amount can be made certain by reference to some paper, or by figures, or in some other infallible mode; in which case it is considered the same as if the amount was ascertained at the time of the promise. But if the mode pointed out by which the amount is to be made certain, either may or may not effect the object —as if one says, "I will pay you the balance due on settlement, provided we can agree on it"—the maxim has no application unless the amount is made certain in that way, for if that fails it cannot be made certain. This distinction will reconcile many of the cases. We do not feel at liberty to follow those that carry the doctrine beyond the fair meaning of the statute.

The second ground relied on by plaintiff is the agreement to refer the matter in controversy to arbitrators; and it is insisted that from this the law implies a promise to pay, for why refer unless you intend to pay? The question is, Does the law, with the aid of the above maxim, from an agreement to refer the matter to arbitrators, imply a promise to pay the debt sued for? From an agreement to refer, the law implies a promise to pay the amount that the arbitrators may find; but there is no ground for the further implication of a promise to pay the amount that a jury may find. On the contrary, the more reasonable inference is that if the matter is to proceed in a regular course of law, the defendant intends to rely on every ground of defense that the law gives him, and there is nothing from which it can be implied that he waives a protection given to him by law and voluntarily takes on himself "the onus" of making a full defense to plaintiff's demand after the lapse of some eight or ten years.

The implied promise to pay the amount that the arbitrators may find leaves the sum indefinite, but a mode is agreed on by which to make it certain. If it is made certain in that way, the promise (276) becomes absolute; but if it is not made certain, there is a promise to pay an indefinite amount, which is of no force and cannot be aided by the maxim, *"Id certum est, quod certum reddi potest";* for, as is already said, that maxim only applies to cases where there is a reference to some paper, or where the thing can be made certain by computation or figures, or in some other infallible mode, not depending on the agreement of the parties or the finding of arbitrators, or the finding of a jury.

In this case the plaintiff holds a receipt of defendants for 150 barrels of herrings, dated 1841. Defendants claim a discharge as to 6 of the barrels. This is objected to by plaintiff, and the parties do not agree. Afterwards the plaintiff brings suit. Defendants ask why he sued. The reply is, "For a settlement"; whereupon the defendants say, "We are willing to settle, and have always been willing"; and it is then agreed to refer the matter to arbitration. Upon what principle can the law, from this evidence, imply a promise to pay the debt sued for? Does the promise include or exclude the value of the 6 barrels disputed? This is uncertain; and not having been made certain, either by the agreement of the parties or the finding of the arbitrators, the promise implied is to pay an indefinite sum, and is too vague to have any legal effect. To allow it to repel the statute "would virtually take away the protection which the Legislature meant to give against stale demands." *Arey v. Stephenson,* 33 N. C., 86.

PER CURIAM. Affirmed.

Cited: Shaw v. Allen, 44 N. C., 59; *McBride v. Gray, ibid*, 421; *McRae v. Leary*, 46 N. C., 93; *McCurry v. McKesson*, 49 N. C., 512; *Shoe Store Co. v. Wiseman*, 174 N. C., 568; *Phillips v. Giles*, 175 N. C., 412.

(277)

WILLIAM COFFIELD AND WIFE v. JAMES L. ROBERTS.

A bequest was as follows: "I give and bequeath to E. and S. all the negroes I sent to my daughter P., to them and their heirs forever; and if *they* should die without an heir, for said negroes to be equally divided between H. and all my children." E. married the defendant, and died, without leaving a child. S. married the plaintiff, is still living, and has several children: *Held*, that E. and S. took vested estates; that cross-remainders could not be implied, and that E.'s estate could only be defeated upon the contingency of Sarah's dying leaving no child.

APPEAL from *Battle, J.*, at Spring Term, 1852, of CHOWAN.

The facts are stated in the opinion of the Court.

R. R. Heath for plaintiffs.
W. N. H. Smith for defendant.

PEARSON, J. The will of Miles Welch contains this clause: "I give and bequeath unto Elizabeth and Sarah M. Simpson all of the negroes I sent to my daughter Penny Simpson, to them and their heirs forever; and if *they* should die without an heir, for said negroes to be equally divided between Henderson Simpson and all my children." Elizabeth married the defendant Roberts, and died without leaving a child. Sarah married the plaintiff, and is still living, and has several children.

One thing is clear: Elizabeth and Sarah took vested estates, and the share of Elizabeth belongs to her personal representatives, unless there is something to defeat her estate. It is said the sisters took cross re-

(278) mainders by implication, and upon the death of Elizabeth without a child, her estate was defeated, and Sarah became entitled to all the negroes. This may possibly have been the intention of the testator, but he has not used words sufficiently definite to enable us to imply a cross-remainder, whereby to defeat a vested estate.

Again, it is said the estate of Elizabeth was subject to be defeated by a contingency. That is true; and the question is, What contingency? If *they* should die without an heir! That has not yet happened, and probably never will, for the chances are that Sarah will leave children at her death, and then the contingency will be at an end. There is no

rule of construction by which the words can be changed so as to read: If *either of them* should die without an heir (a child), then the negroes shall be equally divided, etc.

In groping in the dark to find the testator's intention, which is probably the more difficult because he never thought of the case which has occurred, and consequently had no intention in reference to it, we are relieved by finding that the question has been decided, *Picot v. Armistead,* 37 N. C., 226, and willingly leave this case to rest on that.

PER CURIAM. Affirmed.

(279)

NOAH BRILES v. JAMES PACE.

1. Verbal agreements for leases for any land for more than three years, and those for mining running for any term, though less than three years, are void, by statute.

2. And a contract to transfer such a term, or part of such a term, must, in like manner, be in writing.

APPEAL from *Caldwell, J.,* at Spring Term, 1852, of RANDOLPH.

Assumpsit for the breach of contract on the part of the defendant in not finishing a horse gold-mill, which he had contracted to build, within the time stipulated.

The material facts are as follows: In May, 1847, the plaintiff, being owner of one-half of a lease on a gold mine, and the sole owner of a lease on another part of the same tract of land, by deed assigned the one-half of his interest in the mine to the defendant for $1,600; and the defendant, in part payment of the purchase money, agreed, by parol, to build a horse gold-mill for the plaintiff, on the lease of which he was sole owner, with $400, and was to finish it as soon as such a job could be finished. Defendant commenced and prosecuted the work until some time in the fall of 1847, and then left it in an unfinished state, and went to work on a mill he purchased on the river. In October, 1848, defendant sold and by deed conveyed to one Miller all his interest in the said horse mill, gold mine, and mill on the river, the plaintiff being present and making no objection.

It also appeared on the trial that the plaintiff, at the time of (280) the contract with defendant about said mill, was working said mine in partnership with the owners of the other shares, and after said Miller purchased out the defendant he, the plaintiff, and others, worked the said mine, and used the mill on the river as partners. It also appeared that on 10 December, 1847, the defendant wrote a letter to the

said Miller, excusing himself for not having come back sooner to finish the work on the said mill, and requesting him to hire some one to complete the work; that said Miller handed over the letter to one Floyd to attend to, and he employed one Trotter to do the unfinished work; that said Trotter commenced work on the mill in January, 1848, and worked two days, when he was stopped, and directly thereafter all the machinery that had been put up at the said mill was taken down by the said partners and taken to their mill on the river.

It became a question on the trial whether the defendant was a partner with the plaintiff in the said horse mill, as well as the gold mine, by reason of some understanding between them; and several witnesses were called, who stated that they understood from the parties that they were in partnership in the said mill. There was no evidence offered of a written conveyance from the plaintiff to the defendant for any part of the lease, of which the plaintiff was sole owner, and on which the said mill was to be erected. Defendant's counsel insisted that if there was a partnership, the plaintiff could not recover, and moved the court so to charge. Plaintiff's counsel insisted that there could be no partnership in the said mill, as it was to be built on leased land; and that all leases of land for mining purposes were void, unless in writing, and none such had been offered in evidence; and the court was moved so to charge. It was insisted, also, by defendant's counsel that although the work on the mill had been suspended for several months, on the part of the defendant, yet if Miller, one of the partners, acted upon his letter and em-
(281) ployed Trotter to go on with the work, it was a waiver on the part of the plaintiff as to the suspension of the work. Plaintiff's counsel insisted that Miller, not being a partner at the time the contract was entered into between plaintiff and defendant about said mill, it was not competent for him to waive any right of the plaintiff in relation to such contract; and the court was moved so to charge.

The court charged the jury that if there was a partnership between plaintiff and defendant in the same mill, the plaintiff could not recover; and that though the law annulled leases for mining purposes, yet, after the lease was created by writing, it became a chattel, and was the subject of becoming partnership property without writing. Upon the second point, the court charged that if there was an abandonment of the work by the defendant, and afterwards the said Miller, if a partner at the time, assented to defendant's resuming the work, and he did so, and the work was progressing, and he was stopped by plaintiff, that would amount to a waiver of any previous failure on the part of defendant to fulfill his contract, though said Miller was not a partner when said contract was first entered into; and if such were the case, the plaintiff could not recover.

Verdict for the defendant. Rule for a new trial because of misdirection. Rule discharged. Judgment, and appeal.

P. H. Winston, Sr., Miller and Gilmer for plaintiff.
Mendenhall and J. H. Bryan for defendant.

RUFFIN, C. J. The facts are obscurely stated, so that one (282) cannot be sure of comprehending properly the merits of the case. Yet one error seems sufficiently apparent to require a *venire de novo.* The terms of the instructions, in connection with the positions taken by the parties, imply that the lease to the plaintiff for the premises on which the mill was to be erected was for the purpose of mining, and that thereby the premises became vested in the plaintiff; and that it was intended in some way, direct or indirect, by virtue of a verbal contract, without any writing, to pass the premises and vest them, as partnership property, in the supposed firm constituted by plaintiff and defendant; and then it was laid down to the jury that the term would be so vested in the firm by force of the contract, though without writing. In that opinion the Court does not concur.

The act of 1819, Rev. Stat., ch. 50, sec. 8, makes void every contract to sell or convey any interest in land unless a note thereof be put in writing and signed—excepting only contracts for leases not exceeding three years. The act of 1844, ch. 44, further provides that all contracts for leasing, and all leases of land for the purpose of mining shall be void unless put in writing and signed. The two acts are *in pari materia,* and to be construed accordingly. The effect of them, taken together, is that all contracts to sell or lease land and all leases of land shall be void unless they be written, with an exception of leases not exceeding three years, with a proviso that leases or contracts for lease for the purpose of mining shall not be within the exception, but must be in writing. Therefore, the provisions are that verbal agreements for leases for any land for more than three years, and those for mining for any time, though less than three years, are void. That is not contested in respect to the creation of a term. But a distinction was taken at the trial between the creating and transferring a term; and in the latter case it was held that a writing was not necessary. It is true, there is no express provision in our statutes, as in the statute 29 Car., II., requiring an assignment or underletting by a termor to be in writing, by operation of law. But these results follow as nat- (283) urally and almost as necessarily from the fair construction of our acts as they do from the express provisions in detail in the English statute of frauds. Transfers by act of law, as in bankruptcy or by succession, arise from the nature of property, and there can be no neces-

sity for requiring a writing to pass such interests, or for an enactment that they should pass without writing. What passes by operation of law is necessarily not within the purview of a statute providing for contracts *inter partes*, and prescribing certain forms for particular contracts, in order to guard against pretended contracts being set up by fraud and perjury. It is next to be observed that the creation of a term by the owner of the inheritance of a greater duration than three years, and the transfer of such a term by contract, stand precisely on the same reason, as to the danger of fraud and perjury in claiming under them. Therefore it is natural that they should be placed on the same footing in the statute; and the act, as a remedial one, should be construed as thus placing them, if the words will allow it. The words in these statutes, in truth, embrace the transfer of terms, as well as the creation of them. They are, that all contracts to sell or convey land or any interest in or concerning it shall, with one exception, be void unless in writing. Now, a term for years is not only an interest, but it is an estate, in land; and, therefore, a contract to assign a term is a contract to sell and convey land. Besides, it is a mistake to suppose that the statute, in respect to the creation of terms, embraces only those created immediately out of the inheritance; for it speaks of all contracts for lands, which includes, of course, all leases created in any manner other than those of three years or under, which are expressly excepted. Therefore, if a termor underlets the premises, or a part of them, for part of the term, so as to leave a reversion in himself, that is a new term created out of the (284) former, and is within the words of the act; and if it be for more than three years, it must clearly be in writing. The inference, then, seems irresistible that such a long termor cannot assign without writing; for it would impute an absurdity to the Legislature to suppose a writing indispensable for a termor to pass a part of his estate, while he is allowed to pass the whole by an assignment by word of mouth. It does not, indeed, appear what was the length of plaintiff's term; but it is not material, as it was assumed to be a mining lease, and as has been before observed, the act of 1844 puts that on the same footing with a term in lands generally exceeding three years, and therefore requires writing to create or assign it, by contract.

PER CURIAM. *Venire de novo.*

STATE TO THE USE OF W. DEBNAM, v. R. R. S. LAWRENCE.

A. placed notes in the hands of Lawrence, a constable, for collection. Lawrence went to Alabama without collecting them. A. then took them from Lawrence's saddle-bags and delivered them to Gupton, another constable, taking and placing in the saddle-bags a receipt from Gupton, promising to account with Lawrence. Upon Lawrence's return, he received the money from Gupton: *Held*, that the sureties on Lawrence's constable's bond were not discharged from their liability.

APPEAL from *Dick, J.*, at Spring Term, 1852, of FRANKLIN. (285)

Debt on a constable's bond. The plaintiff offered in evidence a bond executed by one Francis M. Waddell, as constable, and by the defendant as one of his sureties. The said bond was executed at March Term, 1849, of the County Court of Franklin.

Plaintiff then assigned two breaches of the conditions of the bond: *First*, that the constable, Waddell, had not used due diligence in the collection of the bonds placed in his hands for collection by plaintiff. *Second*, that the constable, Waddell, collected the money due on said bonds and failed to pay it over to the plaintiff when required to do so, but had appropriated it to his own use. Plaintiff then offered in evidence a receipt from Waddell, dated 24 April, 1849, acknowledging the receipt of sundry executions from the plaintiff for collection.

Plaintiff then examined one Gupton, who stated that he was a constable in Franklin County in 1849. That on or about 13 June, 1849, W. R. Debnam applied to him to collect certain claims for him, and stated that he had placed the executions in the hands of Waddell for collection and that Waddell had taken a journey to Alabama, but he understood that he had left his papers with his father. Witness and Debnam went to Waddell's father and inquired for his papers, and he produced a pair of saddle-bags, and said he supposed they contained Debnam's papers. Debnam examined the saddle-bags and found the executions which he had placed in Waddell's hands on 24 April preceding. Debnam then drew a receipt, in which it was stated that he (Gupton) had received the aforesaid executions from F. M. Waddell for collection, which receipt was signed by him (Gupton), and then Debnam placed the receipt in Waddell's saddle-bags. This was done with the (286) knowledge and consent of B. Waddell, the father, who was one of the sureties of the said F. M. Waddell. Gupton further stated that in the latter part of the summer of 1849 he collected the money due, to wit, $29 or $30, on said executions, and afterwards paid it over to F. M. Waddell (who had then returned from Alabama), and took up his aforesaid receipt.

A. Debnam was next examined on the part of plaintiff, who stated that he went with his brother, W. R. Debnam, to a sale about 20 November, 1849, when they met F. M. Waddell; that W. R. Debnam applied to Waddell for the money he had collected for him. Waddell said he had collected the money, but had left it in his pocketbook in Louisburg, but if he would come to Louisburg on the next Saturday, that he would pay him his money. On Saturday witness went with W. R. Debnam to Louisburg, where they met Waddell, who then informed them that he had met with a great accident; that he had lost his pocketbook, containing the money of W. R. Debnam, and that he could not pay him.

Plaintiff next examined one Brown, who stated that W. R. Debnam gave him an order on F. M. Waddell for $15, which Waddell refused to pay, saying that he had not the money. This witness further testified that Waddell left this State in February, 1850, much indebted, and now resides in Alabama.

Defendant offered in evidence the deposition of the said F. M. Waddell, in which it was stated that he collected the money due to W. R. Debnam and offered to pay it over to him; that he said that he did not need the money, and that he, Waddell, might keep it and shave notes with it, and they would divide the profits.

Defendant's counsel contended that the defendant was not liable to the recovery of the plaintiff, *first*, because the plaintiff had discharged the defendant by taking the executions out of the possession of Waddell and placing them in the hands of Gupton; and, *secondly*, because the plaintiff made a new contract with Waddell, as stated in his deposition.

(287) The court charged the jury that the law required a constable to collect all claims placed in his hands as soon as it could be reasonably done by exercising proper diligence; that if they believed from the evidence that Waddell had not used due diligence, but had been guilty of negligence in not collecting, or attempting to collect, the executions put into his hands on 24 April, 1849, up to 13 June, 1849, then the plaintiff was entitled to nominal damages; that if they believed that Debnam, on 13 June, 1849, when he procured the executions from Waddell's father and placed them in the hands of Gupton, did not intend to discharge Waddell and his sureties, but his only object was to hasten the collection of his money, and that Gupton paid the money to Waddell, the act would not discharge Waddell or his sureties, and that the defendant would be liable to the plaintiff for the amount paid by Gupton to Waddell, to wit, the sum of $25 or $30, with interest from the time of demand, unless they believed that the plaintiff had made a contract with Waddell that he (Waddell) should retain the money so paid by

Gupton, and shave notes with it, and divide the profits with the plaintiff; if they believed that, they ought to find for the defendant. Verdict for plaintiff. The defendant moved for a new trial, which was refused, and he appealed to the Supreme Court.

Saunders for plaintiff.
Moore and Lanier for defendant.

PEARSON, J. It was the duty of Waddell, before he started to Alabama, to have put the executions into the hands of some other constable. Had they remained in his saddle-bags, where he left them, until his return, he and his sureties would clearly have been liable. (288) The relator did for him what he ought to have done for himself; and it would be a matter of regret if this well-meant interference has in law the effect of discharging those who stood bound for Waddell and putting the loss upon the relator.

We think this consequence does not follow, upon two grounds: *First,* the ground upon which the case is put by his Honor. The relator did not intend to discharge Waddell and substitute Gupton in his stead, but intended merely to do for Waddell that which he ought to have done for himself, and, by placing the papers in Gupton's hands, to enable him, *as the agent of Waddell,* to go on and collect the debts and thereby prevent a loss of the debts, by reason of which Waddell and his sureties would have been liable. It is true, this was not done at the request of Waddell, and, possibly, upon his return he was at liberty to disown the act and insist upon it as a discharge; but he did not do so. On the contrary, he affirmed the act, and in pursuance of it received the money from Gupton, thus bringing himself within the rule, *"Omnis ratihabitio retrotrahetur et mandato aequiparatur." Secondly,* assume that the act of putting the executions in the hands of Gupton was contrary to the intention of the relator, a discharge of Waddell from his first agency, it is clear that the receipt of Gupton to Waddell, written by the relator and left in the saddle-bags, amounted to a proposition that he should undertake a second agency, to wit, that of receiving the money from Gupton when collected. This proposition was accepted and acted upon by Waddell after his return, and he received the money from Gupton, as the agent of the relator, whereby he and his sureties became liable.

This distinction between an execution and a mere claim, put into the hands of an officer for collection, insisted upon by defendant's counsel, is not well founded. The sureties are liable, whether the (289) money is collected "with or without suit"; and in either case the constable is the agent of the party. If Gupton had refused to pay the

money to Waddell, it was in his power and he was bound to issue a warrant for it as the agent of the relator, Rev. Stat., ch. 81, sec. 3; and his paying it without suit has no bearing upon the liability of Waddell's sureties.

It is not necessary to notice the defense set up by way of evidence, because the matter alleged is negatived by the jury.

Nor is it necessary to notice that part of the charge in relation to the right to recover nominal damages, because, as the relator is entitled to actual, the question of nominal damages becomes immaterial.

PER CURIAM. Affirmed.

STATE v. CHRISTOPHER BRAY.

1. In an indictment for bigamy, the place where the first marriage was had is not material. It is sufficient to set forth that there was a prior marriage.

2. The words, "the cure of souls," used in the marriage act, Rev. Stat., ch. 71, does not imply a necessity that the minister should be the incumbent of a church living, or the pastor of any congregation or congregations in particular; but they do imply that the person is to be something more than a minister merely, and that he has the faculty, according to the constitution of his church, to celebrate matrimony, and to some extent, at least, has the power to administer the Christian sacraments, as acknowledged and held by his church.

3. When a marriage is claimed to have been made by a minister, the extent of his authority for that purpose should appear.

4. The statute admits every one to be a minister who, in the view of his own church, has the cure of souls by the ministry of the Word, and of any of the sacraments of God, according to its ecclesiastical policy, implying spiritual authority to receive or deny any desirous to be partakers thereof, and to administer admonition or discipline, as he may deem the same to be to the soul's health of the person, and the promotion of godliness among the people. When to such a ministry is annexed, according to the canons or statutes of the particular church, the faculty of performing the office of solemnizing matrimony, the qualification of the minister is sufficient, according to our statute.

APPEAL from *Battle, J.*, at Spring Term, 1852, of PASQUOTANK.

Indictment for *bigamy*, and charging the first marriage to have been in Pasquotank County, in this State. On the trial, the person who celebrated it testified that it was in Camden County, and that at the time he was a regularly licensed preacher of the Methodist Episcopal Church, and was recognized by that denomination as a regular minister of that church, and occasionally preached in the Methodist churches,

but had not the charge of any particular church or congregation. The court instructed the jury that it was immaterial where the first marriage took place, provided it was duly celebrated; and that, if they believed the evidence, the witness was a minister of the gospel competent to solemnize it. The prisoner was convicted and sentenced, and then appealed.

Attorney-General for the State.
Heath and Ehringhaus for defendant.

RUFFIN, J. The Court considers the first instruction right. (291) The offense consists in the second marriage, and therefore it must be truly laid, in respect of the place, and the indictment must be in the same county. The first marriage must, indeed, be set forth, because the second marriage is criminal by reason only that the first wife was living. But if she was living, the crime is complete without regard to the place where the first marriage was had. Therefore, although time and place are, according to the precedents, usually annexed to every fact alleged in an indictment, yet, in this instance, neither is material, and the one need not be proved as laid, more than the other; but it is sufficient to show that at some time before the alleged second marriage there was at some place the alleged first marriage.

The second point depends upon the meaning to be given to the marriage act, Rev. Stat., ch. 71. It enacts that all regular ministers of the gospel, of every denomination, having the cure of souls, shall be authorized to solemnize the rites of matrimony according to the rites and ceremonies of their respective churches and agreeably to the rules in the act prescribed. It then prescribes that marriage shall be by license or by publication of bans by any minister of the gospel qualified as in the act before prescribed. It was not directly stated by the witness in this case that he was such a minister as had power, according to the rules of his church, to join in wedlock, nor in what grade of the ministry of that church he was. He called himself a "licensed preacher," and then "a regular minister," and said he occasionally preached in Methodist churches, but had not the charge of any church or congregation in particular; and he did not set forth that he had ever performed any other ministerial act besides that of preaching, or had the authority of the church to do so. It seems to the Court it did not sufficiently appear that the witness was qualified to marry persons by being (292) a regular minister of the gospel of the Methodist denomination, having the cure of souls. It is not supposed by the Court that the cure of souls, as used in the act, implies a necessity that the minister should

be the incumbent of a church living, or the pastor of any congregation or congregations in particular. But those terms import that the person is to be something more than a minister or preacher merely, and that he has faculty, according to the constitution of his church, to celebrate matrimony, and to some extent, at least, has the power to administer the Christian sacraments as acknowledged and held by his church. We know not how less force can be allowed to those terms, if any meaning is to be given to them; and a comparison of those terms with those read in the previous statutes, and with the state of the common law on this subject, shows it to be, probably, the true meaning of them.

By the marriage act of 1741, Davis's Rev., 56, the rites of matrimony might be celebrated by "every clergyman of the Church of England," and, for want of such, by any lawful magistrate within this government, by license or "by the publication of bans as prescribed in the Rubrick in the Book of Common Prayer"; the magistrate, however, not to marry, under a penalty, "in any parish where a minister shall reside and have a cure," without permission from such minister, and "the minister having the cure of any parish," and not refusing to perform the ceremony, to have the fees for marriages, in the parish, by any other person. In an act in 1765, for establishing an orthodox clergy, provision of a salary and also of fees, including fees for marrying by license or bans, was made for "every minister prepared to or received into any parish as incumbent thereof," but any clergyman "presented to a parochial living"
was for crime or immorality made subject to suspension by the
(293) Governor from "serving the cure of such parish whereof he was incumbent," and from the salary, until the Bishop of London should restore him, or by sentence deprive him. Davis's Rev., 338. By an act of 1766, to amend the marriage act of 1741, it was recited that the "Presbyterian or Dissenting Clergy," conceiving themselves not to be included in the restriction in that act in respect to license or bans, had joined persons in matrimony without either license or publication, whereby the payment of the fees had been eluded and the validity of marriages endangered; and thereupon it was declared that the previous marriages by any of the Dissenting or Presbyterian clergy, in their accustomed manner, should be as effectual as if performed by any minister of the Church of England; and also enacted that after 1 January, 1767, it should be lawful for any "Presbyterian minister, regularly called to any congregation in the Province, to celebrate the rites of matrimony between persons in their usual accustomed manner," under the same rules as any magistrate might celebrate them, by license or bans, with a proviso that the minister of the Church of England, serving the cure of the parish, "should have the fees, if he did not refuse to do the service

thereof." Davis's Rev., 350. Next came the act of 1778, which recited that it is absolutely necessary that rules should be observed concerning the celebrating the rites of matrimony, and then enacted in the words, reënacted in 1836, and already quoted from the Revised Statutes, with a proviso "that the people called Quakers shall still retain their former rules and privileges in solemnizing the rites of matrimony in their own church." It is thus seen that at the first the clergy of the Established Church only could celebrate matrimony. But the power was not confined to any portion of them. It was vested in "every clergyman of the Church of England," though the fee belonged to "the minister serving the cure of the parish," or "the incumbent of the parish," as he is indifferently called in the several parts of the statute. That (294) church was then established here by law, and therefore it is judicially known that each of the three orders of its ministry was conferred by ordination, and that one in the lowest of them, that of deacon, could be the rector of a parish and celebrate the rites of matrimony according to the Rubrick of the church, and, therefore, according to the provincial statutes. Each of them had, by ordination, the faculty of baptism and the cure of souls and was a clergyman, though not "presented to a parochial living," or not "serving the cure of any parish," or not "having the cure of a parish," or not being "the incumbent of a parish," that is, in possession of a benefice or church preferment. The acts clearly recognize in that church the distinction between the cure of souls and the cure of a parish; for the authority to perform the ceremony belonged to every clergyman, whether bishop, priest, or deacon. When extended to the Presbyterian ministers, it was conferred not on all, but on those "regularly called to congregation," that is, called according to the rules of that church; and they were to celebrate the rites "in their usual and accustomed manner," that is, according to the power and authority to perform the office, and of the actual settlement of the minister as pastor of some congregation. It did not prevent the celebration by any Dissenting ministers, as they were called by the Church of England, but the Presbyterians. At that time there were but few others here; and the society now denominated the Methodist Church was hardly known here, and the small body then existing had not, either in England or this country, separated from the Establishment. But soon afterwards, and especially when the Revolution overturned the Establishment and scattered the clergy, that religious society and others increased rapidly, and have since numbered great multitudes. The progress towards this result was seen, while it was still deemed necessary that matrimony should be celebrated by some rules; and the Legislature thought it convenient that those who looked to a religious rite as a bless- (295)

ing on their nuptials should not be restricted to the narrow limits of settled Presbyterian ministers and the clergy of the Church of England—the latter of whom, indeed, had become inaccessible here, literally speaking. Therefore the act of 1778 drops the terms "clergy of the Church of England," "Presbyterian ministers," "cure of a parish," "called to a congregation," and, instead of them, embraces "all regular ministers of the gospel of every denomination," with only this qualification, that they should have "the cure of souls, and celebrate the rites of matrimony according to the rites and ceremonies of their respective churches." To this qualification some effect must be given. It is plain that every minister of a religious society is not necessarily embraced, else the latter words would not have been found in the act at all; for a person may be licensed to read the Scriptures in the congregation, or to read or say prayers, or to preach, and yet not be a regular minister of the gospel in his denomination, with cure of souls, because he has not been ordained, by the constituted authorities of his church, to the office of administering all or any part of the Christian sacraments, and thus have the cure of souls, as acknowledged and held by his church. The act ought to be thus understood, because, under the law as it stood before, there was that distinction between the cure of souls and the cure of a parish, as we have seen. The statute, without assuming to pronounce dogmatically who were true ministers of the gospel, meant to give a catholic rule, by admitting every one to be so, to this purpose, who, in the view of his own church, hath the cure of souls by the ministry of the Word, and any of the sacraments of God, according to its ecclesiastical polity, implying spiritual authority to receive or deny any desiring to be partakers thereof, and to administer admonition or discipline, as he may deem the same to be to the soul's health of the
(296) person and the promotion of godliness among the people. When to such a ministry is annexed, according to the canons, or statutes of the particular church, the faculty of performing the office of solemnizing matrimony, the qualification of the minister is sufficient, within the statute. That seems to be the meaning of the act, as far as it can be discovered from its own language or that of preceding statutes, or to be gathered from the political or religious state of the country, existing or expected, when it was passed. That is rendered the more probable by the proviso respecting the Quakers. That religious denomination, it is generally understood, have not ministers, in the sense in which others who profess to be Christian churches use that term; meaning those who, by open vows, take on themselves the ministry of the sacraments or sacrament, and are set apart and ordained by due authority of the church to that office. They have, we believe, preachers but not pastors

nor ministers. Hence, among them the provision is not that "their ministers" may celebrate the rites of matrimony between their members or others, but that "the Quaker people" shall retain their former privileges of marrying in their own church, which raises an inference, in respect to other denominations, of the correctness of the construction and rule first laid down.

It was not necessary, therefore, to the validity of the marriage that the witness should appear to have been a minister in charge of a church, or the rector of a parish, or pastor of a particular flock. But it is necessary that he should have appeared to be a minister, capable of entering upon the duties of such a charge, according to the ecclesiastical economy of his church, with the faculty of celebrating the rites of matrimony. Perhaps that ought to have appeared affirmatively, either upon the evidence of the witness or otherwise. At all events, if his capacity in that respect was left doubtful upon the evidence, it was erroneous to (297) instruct the jury that the witness was competent. To make the most of the evidence, the point was left doubtful. There was no evidence that the witness had ever married any persons, or would be allowed by his church to do so. And upon inquiry from respectable ministers and others versed in the constitution of that church, and looking into their Book of Discipline, it is found to be uncertain whether the witness had the authority to marry or not. It seems that marriage may be solemnized by any minister, and that their ministry consists of elders and deacons, ordained by the bishop, and that of these there is a subdivision into traveling and local preachers; that the traveling elder may administer baptism and the Lord's Supper and perform the office of matrimony, and all parts of divine worship; and that the traveling deacon may baptize and perform the office of matrimony in the absence of the elder, and assist the elder in administering the Lord's Supper. But we are not informed whether the local deacons and elders are ordained to those offices with the like duties and powers with those in the traveling connection. And, besides, there is another class of persons, called "licensed preachers," who are not ordained, and have no spiritual jurisdiction or faculty to administer any sacrament, as to marry, but only "to preach," under a license from the Quarterly Conference, "composed of traveling and local preachers, exhorters, stewards, and class leaders of the circuits and stations"; which license lasts but for one year, and must be renewed annually for four years to render the person eligible to the office of a local deacon. It must be understood that the witness was not a traveling elder or deacon, since to them belongs the charge of the different churches. He was, therefore, either a licensed preacher or a local preacher; and in

the former case he was certainly not authorized to marry; and in the latter it cannot be told whether he was or not. Therefore, it is proper the cause should go to another jury, where the true character of (298) this person's ministry may be shown.

PER CURIAM. *Venire de novo.*

Cited: S. v. Parker, 106 N. C., 713; *S. v. Wilson,* 121 N. C., 656.

BENJAMIN F. BORDEN, ADMINISTRATOR, v. EDWIN THORPE, ADMINISTRATOR.

1. It is not necessary, in any case, for the representative of a deceased plaintiff to issue a *scire facias* to make himself a party, but he may be made so by an application to court, and the law keeps the defendant in court for two terms for that purpose.

2. Where, after an appeal to the Supreme Court, the defendant, appellant, dies, and there has been an administration *de bonis non* granted, if no error is found, the judgment is that there was no error in the original judgment, and that the plaintiff recover, here, the damages and costs against the administrator *de bonis non*, to be levied *de bonis intestati*, and also against the sureties for the appeal. If the plaintiff cannot thus obtain satisfaction, he must proceed either by *scire facias* or action of debt on the judgment against the administrator *de bonis non*, in order to charge him therein with assets; for the question of assets cannot be put in issue upon a *scire facias* to revive a suit before judgment.

3. It has been the practice in this State, when a defendant dies while a cause stands on issue, to allow his executor, when brought in, to plead the want of assets; but it is a practice tolerated among the profession for their own convenience, and has passed *sub silentio*, and cannot be sustained, if objected to.

4. A *scire facias* against an executor, before final judgment, is merely to make the executor a party to the record, and though the judgment be against the executor, it is not a judgment fixing him with assets; a second *scire facias* is necessary for that purpose, in which he may plead a want of assets or make any other defense which he might have made if sued on a judgment against the testator. The only instance in which a plea can be admitted is that of release, or satisfaction since the last continuance; which, from necessity, would probably be received upon a proper case shown, as, indeed, they might have been pleaded by the original defendant.

5. In no instance has the executor of a defendant the right to make a personal defense, except only to deny his representative character, which may be summarily determined by the court, or by a collateral issue.

6. If, on an appeal to the Supreme Court, the judgment below be not reversed, the actual judgment here must be for the damages assessed, *de bonis intestati*, and against the sureties for the appeal.

APPEAL from *Dick, J.*, at Fall Term, 1851, of CRAVEN.

Assumpsit upon a special contract of hiring, and on a *quantum meruit* for work and labor. It was brought 4 April, 1849, in the Superior Court, by Ellen T. Simpson against Edwin A. Thorpe, administrator of Lott Holton, deceased, who pleaded *non assumpsit* and the statute of limitations. After issues were joined thereon, the plaintiff Simpson died, and her death was suggested at October Term, 1850, and the present plaintiff, Borden, administered on her estate, and a *scire facias* was issued to him at the instance of the defendant Thorpe, returnable to the next term, requiring him to proceed in the suit. The parties accordingly appeared by their attorney, and in November, 1851, the case was tried, and the plaintiff had a verdict and judgment, from which the defendant appealed. Upon the trial evidence was given that the intestate, Simpson, lived with Holton as a housekeeper for ten years or upwards, and that her services were worth $100 a year; that in February, 1848, Holton stated that he had promised to give her, Simpson, then present, $100 a year for her services, and that she had been in his employment about ten years, and that she had been worth that to him; and he requested a witness to take notice that she was to have $100 a (300) year for the time she had been in his employment. The court instructed the jury that if Holton contracted with Simpson to give her $100 per annum when she went to live with him, and if he admitted the debt in February, 1848, as stated by the witnesses, the plaintiff would be entitled to recover at that rate for the time his intestate was in the service of Holton; and the jury thereupon gave $1,000 damages. After the appeal was brought to this Court, Edwin D. Thorpe died, and Sidney A. Thorpe took the administration *de bonis non* of Holton, and the suit was then revived against him by *scire facias*.

J. H. Bryan and William H. Wright for plaintiff.
William H. Haywood and J. W. Bryan for defendant.

RUFFIN, C. J. It was properly admitted by defendant's counsel that the bill of exceptions furnished no ground for a *venire de novo*, for, undoubtedly, there was sufficient evidence, if believed, of the services of an original express contract, and an express new promise to pay this particular demand, to give a good cause of action and to repel the bar of the statute.

There were, however, some objections taken in arrest of judgment which it is necessary to notice. First, it was said that the suit abated because the administrator of the original plaintiff did not apply in due time to carry it on and make himself a party. But the acts of 1785 and 1786 expressly provide that upon the death of either plaintiff or defendant every appeal or suit may be proceeded on by application of the heirs, executors, or administrators of either party; and in this case the defendant took the necessary steps to revive the suit. Indeed, it cannot be necessary for the representative of the plaintiff in any case to issue a *scire facias*, but it is sufficient that he apply in court to be made (301) a party, because the law keeps the defendant in court for two terms for that purpose. Besides, if there were any irregularity, it was waived by the defendant, who did not object to the order renewing the suit, and it is now too late to insist on it. *Anonymous*, 3 N. C., 66.

It was next said that the judgment could not be affirmed because of the death of the administrator after the appeal, and the bringing in of the present defendant, who is administrator *de bonis non*, and may not have the assets. If there had been final judgment against the first administrator, not appealed from, it seems that, even at common law, upon his death the plaintiff might have a *scire facias* to have execution against the administrator *de bonis non* (*Snape v. Norgate*, Cro. Car., 167); and in that case the administrator *de bonis non* may plead *plene administravit*, because the object is to fix him conclusively with the debt. This case, however, is not of that kind, as the judgment against the first administrator was not final, by reason of the appeal, and therefore the purpose is, not to have execution upon a judgment, but to revive the suit in order to obtain a judgment on the verdict rendered, or otherwise to prosecute the suit to a recovery. The case, therefore, depends on the act of 1824, that no suit to which an executor or administrator is a party shall abate by his death, but it may be revived by or against the administrator *de bonis non*, as the same might be revived by or against an executor, upon the death of his testator, plaintiff or defendant. Rev. Stat., ch. 2, sec. 6. Of course, the mode of proceeding and the form of entering the judgment must be made to conform to the statute; and in this case, as there was no error in the judgment of the Superior Court, the proper judgment here will be that there was no error in the original judgment, and that the plaintiff recover here the damages and costs against the administrator *de bonis non*, to be levied *de bonis* (302) *intestati*, and also against the sureties for the appeal. If the plaintiff can obtain satisfaction upon execution against those parties, it will suffice him. If, however, he should not, then he must proceed either by *scire facias* or action of debt on the judgment against

the administrator *de bonis non*, in order to charge him therein with assets; as it seems very clear, upon principle and authority, that the question of assets cannot be put in issue upon a *scire facias* to revive a suit before a judgment. It has been a practice, we believe, when a defendant dies while the cause stands on issue, to allow his executor, when brought in, to plead the want of assets. But it is a practice tolerated among the profession for their own convenience, and has passed *sub silentio*, and cannot be sustained if objected to. The statute of 8 and 9 W. III., ch. 11, gave a *scire facias* against the executor of a defendant dying after interlocutory and before final judgment; and it was held that the purpose of that *scire facias* was merely to make the executor party to the record, and therefore that, though the judgment was against the executor, it was not a judgment fixing him with assets, and that a second action was necessary for that purpose, in which he might plead the want of assets or make any other defense which he might make if sued on a judgment obtained against the testator. *Smith v. Harmon*, 6 Mad., 144; *Tompkins v. Grattin*, Say., 256; 2 Saund., 72; *McKnight v. Craig*, 6 Cranch., 183. One must see at once that it is so, when one adverts to the fact that a right in the executor to plead would give him the absolute power to set aside the interlocutory judgment, and thus defeat the whole Statute of William. The same principle applies to the case of a judgment by default in our law; for, although our statute is general, and allows suits in every stage, and appeals, to be revived by or against an executor, yet the effect of allowing an executor, brought in as a defendant, to make a personal defense in any one case, in destruction of the right given to the plaintiff by the statute, is a just argument (303) against allowing it in any case. Therefore, when it is seen that in the case of a judgment by default the plea of the executor of want of assets destroys the judgment, it cannot be admitted within the just construction of our statute, more than under the English statute, which is confined to the single case of an interlocutory judgment. In such a case it would seem that the only instance in which a plea could be admitted is that of release or satisfaction since the last continuance, which, from necessity, would probably be received upon a proper case shown, because they go to the whole action and might be pleaded by the original defendant, if living. So, for example, if an appeal be taken from the county to the Superior Court by the defendant, and he die, it can be no bar to the plaintiff that the defendant's executor has no assets; for the appeal bond was provided as a security against the very event alleged, that is, the insolvency of the original defendant, and, by consequence, of his estate. And much stronger is the reason in the case of an appeal from the Superior Court to this Court, since here there is no trial *de novo*

nor new pleading. These reasons are sufficient for the case before us. But it seems proper to say that they satisfy the Court that in no instance has the executor of a defendant the right to make a personal defense—saving only to deny his representative character, which may be summarily determined by the court or by a collateral issue; because the cause ought to be uniform, and it is clear that it is inadmissible in the cases before specified. The judgment in this case should be that before mentioned, because it seems to be precisely analogous to the case under the Statute of William, of the defendant's dying after the execution of the writ of inquiry and before the return of it; in which case the *scire facias* is to show cause why the damages assessed should not be adjudged to the plaintiff, and thereupon they are adjudged against the
(304) executor. *Goldsworthy v. Southcoft*, 1 Wits., 243; 2 Saund., 6, and note 1. It is true, that cannot be the form of the *scire facias* with us, but it must be to make the executor a party to the record, so that the suit may be proceeded in; because, peradventure, the judgment on the appeal may be reversed and a *venire de novo* be awarded. Therefore, the precise judgment, that the damages assessed be adjudged, is not to be prayed in the *scire facias*, but, if the judgment below be not reversed, then the actual judgment here must be for the damages assessed *de bonis intestati*, and against the sureties for the appeal. The first administrator was fixed with assets, and the plaintiff cannot be defeated of his recovery against them because they have not yet reached the hands of the administrator *de bonis non*. If he could, the act giving the right of revivor against the administrator *de bonis non* would be of no value before final judgment.

It appears that the original plaintiff, Simpson, was allowed to prosecute the suit in *forma pauperis;* and it is further objected that the costs during her time cannot be taxed and included in the judgment. That point, however, is put out of the case by the consent of the plaintiff to include in the judgment only the costs of his own time, to which he is certainly entitled.

PER CURIAM. Judgment accordingly for the plaintiff.

Cited: Windley v. Bonner, 99 N. C., 57.

(305)

THOMAS JONES v. JOHN GLASS.

1. The master is answerable for any carelessness, ignorance, or want of skill in his overseer, while engaged in the course of the master's employment, whereby a permanent injury is done to a slave, hired from another person.

2. Per RUFFIN, C. J. This was simply a case of bailor and bailee, and on the principles applicable in that relation the plaintiff should recover.

APPEAL from *Dick, J.*, at Fall Term, 1851, of CALDWELL.

This was a special action on the case, brought to recover damages for an injury done to a negro slave, the property of the plaintiff, by the overseer of the defendant.

The facts of the case were substantially as follows: Plaintiff hired a negro man, named Willie, to defendant, who was a miner, to be employed as a laborer in the mine. Defendant had an overseer by the name of Massey, under whom the said Willie and other hands were placed, Massey having the control and management of the said Willie and the other hands. On a certain morning Willie went to work at the mine, but early in the day quit his work, came to the negro house, where he usually lodged, and alleged that he was sick and unable to work. Massey, the overseer, missed him at the mine and followed him to the house, and attempted to tie him, for the purpose of correcting him. Willie offered to submit to correction, but said he did not wish to be tied. The overseer insisted on tying him, and succeeded in tying one arm, on which Willie made some move towards the door, as if he would escape. Upon this, Massey took up a piece of wood, about 3 feet long and 3 inches in diameter, and gave him a violent blow on the left side of the head, and knocked him down, where he remained until the next day. (306) A physician, who was sent for, stated that he found Willie lying on the floor speechless; that there was a large fracture or indentation of the skull, and his whole right side was paralyzed; that he expected him to die in a short time; but that, after a few days, he began to get better, and so continued until he ceased to attend him; and about three months after he received the injury he was sent home to his master. The condition of the negro after that time was proved by other witnesses.

Defendant's counsel contended that defendant was not liable, because the blow inflicted by Massey was a trespass with force and arms, and not injury resulting from negligence. And as the defendant was not present when the blow was inflicted, and discharged Massey as soon as he was informed of it, he was not liable to the plaintiff.

The court charged the jury that Massey, being the overseer of the defendant, and having by his authority the control and management of

the slave, Willie, had a right as overseer to correct the slave in a reasonable manner, in order to reduce him to submission to his lawful commands; but if in doing so he negligently or carelessly used an instrument wholly unjustifiable for reasonable correction, and a permanent injury to the slave was thereby inflicted, the plaintiff was entitled to recover for the injury he had sustained.

The jury found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

No counsel for either party.

NASH, J. We concur in the opinion of the judge below. The only question is as to the relation in which the defendant stood towards Massey, the man who inflicted the blow. The case is, shortly, (307) this: The defendant was the owner of a mine, which he worked, and employed as his overseer the man Massey. Plaintiff hired to him a negro boy as a hand to work in the mine. Massey, for some alleged offense on the part of the boy, was about to correct him, when, being tied, the boy made a motion to escape, when Massey struck him on the side of the head with a piece of wood about 3 feet long and between 2 and 3 inches thick. Massey was defendant's manager, or overseer, and for every injury which he does to the property of another, entrusted to his care, in carrying on the business of the defendant, which is the result of carelessness, ignorance, or want of skill, the latter is answerable. Massey had a right to correct the boy, Willie, and compel him to do his work. The boy had left the mine without permission, under the allegation of being sick. Whether he was in a condition to labor, Massey was the judge, and, at the time, the sole judge, and it is but just to suppose that, in the effort to punish the boy, he was satisfied that sickness was feigned by him. The act, therefore, of whipping or chastising the boy was, on the part of Massey, a lawful one, to the extent of compelling him to work, and the owner of the boy has no right to complain; but in the correction it was his duty to do it properly; that is, in a proper manner and with a proper instrument. If he was negligent or guilty of a want of care in either particularly, he is answerable for any permanent injury resulting to the boy. True, Massey was guilty of great negligence in the use of an instrument calculated not to correct, but to kill. The responsibility, however, is not confined to Massey, but extends to his employer. He was his selection, held out by him to others as a man to whose skill and discretion slaves could safely be entrusted in carrying on the mining business, and the work was done for him. And

the blow which caused the mischief was given by Massey in performance of the defendant's business, and to compel an attendance to it. It is not like the case of a servant who, in driving his master's (308) carriage, voluntarily, and of his own head, leaves the track he is in and runs over a man. The master, there, is not answerable, for the plain reason that, in committing the trespass, the servant was not doing the business his master had put him about. Here Massey was doing the very thing for which the defendant had employed him, to wit, overseering the hands and compelling them to do the work in which they were engaged. In executing his duty he was, in using the instrument he did, guilty of great negligence and want of care, for which the defendant is answerable.

RUFFIN, C. J. Much of the argument respected the liability of a master for injuries to strangers from the willful or negligent act of a servant. This, however, is not a case of that kind, but entirely different. It is a question between bailor and bailee for hire; and the plaintiff's right to recover cannot be seriously doubted, upon the principles applicable to that relation. Such a bailee is entitled to make such use, and bound to take such care, of the thing bailed as persons of ordinary prudence usually do of their own. By that rule, the defendant must have been held liable to the extent to which the value of the slave was permanently impaired, if he had himself inflicted the unreasonable and dangerous blow with the deadly weapon, which his overseer gave, instead of resorting only to such moderate and usual correction as would have reduced the slave to subordination and been of good example to other slaves. If the defendant would have been thus liable for the act had it been that of his own hand, he is, as bailee, equally liable for it as the act of one to whose control and management he committed the slaves. If one hire a horse and work him excessively, or otherwise wantonly injure it, he is responsible for the damage, either upon his con- (309) tract or in case. So, if he give it to his wagoner to drive, or lend him to a third person to drive in his wagon, and either of those persons overwork the beast, so that he die, or, in a passion at its restiveness or attempt to run away, maim it, inflict any lasting injury, the hirer would clearly be liable to the owner. It is true, the person who did the deed would be liable both to the hirer and the owner. But that cannot prevent the owner of his remedy against the hirer, since, by the contract, and also the obligations of the law arising out of the relation between the parties, the hirer is bound to ordinary care, and he had no right to confide the property to a person, or his servant, or borrower from him, who would not treat it in the manner in which he undertook it should

be treated. The defendant was, therefore, bound for the care and conduct of his overseer towards this slave as he was for his own, and the judgment should be affirmed.

PER CURIAM. No error.

Cited: Ponton v. R. R., 51 N. C., 248; *Huntley v. Mathias*, 90 N. C., 105; *Daniel v. R. R.*, 117 N. C., 605.

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(310)

PATRICK B. THREADGILL v. CHARLES WEST.

When a person has been sued on his bond as administrator, within two years after the relator's coming of age, he having been an infant at the time of the execution of the bond, the administrator, though the bond was given more than ten years before action brought, can have no advantage from the act of Assembly relating to presumption of payment.

APPEAL from *Battle, J.*, at Fall Term, 1850, of ANSON.

Debt upon an administration bond, which, being informal, was declared upon as a bond at common law. The breach assigned was that James Ross, the principal in the bond declared on, in which the defendant was a surety, had not accounted with Richmond Bailey, the relator, the amount to which he was entitled as the next of kin of the intestate. Pleas: conditions performed and not broken, and payment.

Upon the trial it appeared that the relator was an infant of tender years when the bond was executed, and came of age only a year or two before the commencement of this suit. But, notwithstanding this, the defendant insisted that, by virtue of sections 13 and 14, chapter 65, Revised Statutes, or by virtue of the common law, there was a presumption of a performance or payment of the bond by the principal obligor, and, therefore, the action could not be sustained, and this, especially, because the bond was only a common-law bond. The plaintiff contended that the infancy of the relator prevented the presumption from arising either by the common law or by virtue of the statute, if, indeed, the statute applied to such a case at all, which he denied.

Verdict for plaintiff, and from the judgment thereon the defendant appealed.

(311) *Strange for plaintiff.*
Winston for defendant.

NASH, J. In the opinion of his Honor who tried the cause there is no error. The action is on a bond given by James Ross, as administrator of Sherod Bailey, to which the defendant was one of the sureties, and is dated 13 April, 1826. The bond, being defective as an official bond, the declaration is at common law. The writ was issued 11 July, 1848, and the defendant, under the proper plea, relied upon the lapse of time as proof of payment. At the date of the bond the person interested was an infant of tender years, and brought the action within two years after attaining his majority. It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either direct or presumptive. Thus, a debt once proved to have existed is presumed to continue, unless payment or some other discharge be proved or established from circumstances. *Jackson v. Irwin,* 2 Camp., 48. Among the presumptive proofs of payment of a bond is lapse of time. The courts of common law in England established the artificial presumption, when payment of a bond or other specialty was not demanded within 20 years, and there was no payment of interest within that time, or other circumstances to show that it was still in force, that payment ought to be presumed by a jury. *Oswald v. Legh,* 1 Tenn., 271. So continued the law in this State until the act of 1826, ch. 28, was passed (Rev. Stat., ch. 65, sec. 13). By that act the time within which the presumption is limited to arise is cut down to ten years. Forbearance to sue for such a length of time will raise the presumption of payment.

It is, however, but a presumption, and may be answered by (312) proof of other circumstances explaining satisfactorily why an earlier demand has not been made, as in *Newman v. Newman,* 1 Star., N. Pr. Cases, 101, when the obligee had resided abroad for the last twenty years. 2 Phil. Ev., 171. In this case the presumption of payment could not arise. The person for whose benefit the bond was given and for whose interest the action is brought was at its execution an infant, and continued so until within two years before the action was brought. The presumption under which the defendant seeks to protect himself is that he has paid the money. The condition of the bond bound him to pay the money when the infant came of age; he did not do so until within ten years before the action was brought. The presumption of payment did not arise in this case.

PER CURIAM. No error.

STANMIRE v. POWELL.

1. A grant founded on an entry made on land subject to entry cannot be collaterally impeached for defects in the entry or irregularity in any preliminary proceeding.

2. But when the law forbids the entry of the vacant land, in a particular tract of country, a grant for a part of such land is absolutely void; and that may be shown in ejectment.

3. The General Assembly, in 1849, passed the following resolution: "*Resolved*, That the Secretary of State be, and he is hereby authorized and required to issue to Ailsey Medlin, or her heirs or assigns, for the services of her father, etc.; or his heirs or assigns, a grant or grants, for a quantity of land, not exceeding 640 acres, to be located in one body, or in quarter-sections of not less than 160 acres, on any of the lands of this State now subject to entry by law; said grant or grants to be issued on the application of the said Ailsey Medlin, her heirs or assigns, as she or they may prefer, in one or four grants. (2) That the said warrant or warrants shall or may be laid so to include any lands now belonging to the State for which the State is not bound for title: *Provided*, that this act does not extend to any of the swamp lands in this State." The grant under this resolution issued for land lying in the Cherokee country.

4. *Held*, that the grant was void, having issued for land lying in the Cherokee country, where the lands are prohibited from entry by the general law, and where, indeed, no entry-taker's office is established.

APPEAL from *Settle, J.*, at Fall Term, 1851, of CHEROKEE.

RUFFIN, C. J. The premises lie in Cherokee County and contain 140 acres. The lessor of the plaintiff claims title in the following manner: The General Assembly of 1848 passed a resolution, which was ratified on 26 January, 1849, in these words: "*Resolved*, (1) That the Secretary of State be and he is hereby authorized and required to issue to Ailsey Medlin, for the services of her father, Benjamin Schoolfield, in the continental line of the State in the War of the Revolution, or her heirs or assignee, a grant or grants for a quantity of land, not exceeding 640 acres, to be located in one body, or in quarter-sections of not less than 160 acres, on any of the lands of this State now subject to entry by law; said grant or grants to be issued on the application of the said Ailsey Medlin, her heirs or assignee, as she or they may prefer, in one or four grants. (2) That the said warrant or warrants shall or may be laid so as to include any lands now belonging to the State for which the (314) State is not bound for title: *Provided*, that this act does not extend to any of the swamp lands of this State." On 25 September, 1849, a grant for the premises was issued to the lessor of the plaintiff, wherein is recited the above resolution in favor of Ailsey Medlin, and

that Stanmire is her assignee, and the land is described as lying in the Cherokee Country, by metes and bounds set forth in the patent and in the plat annexed thereto, and the quantity stated to be 640 acres.

The defendants admitted themselves to be in possession of 400 acres, part of the land granted to the lessor of the plaintiff, and they claimed title thereto as follows: It is tract No. 71, in District 6 of the Cherokee lands, surveyed for the State for sale on 29 May, 1837, and was purchased from the commissioners, Samuel F. Patterson and Charles L. Hinton, at the sales of the Cherokee lands on 2 November, 1838, at the price of $8,000, by the defendant John A. Powell, who then paid $1,000 of the purchase money and gave his bond for the residue, according to the statute. He took from the commissioners a certificate of his purchase, endorsed on the survey, describing the land, and in 1841 he paid into the treasury the sum of $400, in part of his bond. Immediately on his purchase he entered into possession of the land, and he and the other defendants under him have been in possession of that parish ever since, claiming it under the purchase. By consent, a verdict was taken for the plaintiff, subject to the opinion of the court on the foregoing facts. Afterwards his Honor, being of opinion with the defendants, set the verdict aside, and, according to the agreement, gave judgment of nonsuit, but allowed the plaintiff an appeal.

No counsel on either side.

RUFFIN, C. J. The question is as to the validity of the grant (315) to the lessor of the plaintiff. It is settled in this State that a grant founded on an entry made where vacant land is subject to appropriation by entry cannot be collaterally impeached for defects in the entry or irregularity in any preliminary proceeding. But a distinction is equally well established, that when the law forbids the entry of the vacant land, in a particular tract or country, a grant for a part of such land is absolutely void; and that may be shown in ejectment. Thus, entries within the Cherokee boundary were forbidden by the acts of 1778 and 1788, and, consequently, the grants were held to be void. *Avery v. Strother,* 1 N. C.; *Strother v. Cathey,* 5 N. C., 102. So the confiscated lands were grantable only on sales by the commissioners, certified to the officers of State; and, therefore, an entry and grant thereof was held void in a suit for the land. *University v. Sawyer,* 3 N. C., 98. In these instances the subjects, if one may so speak, were not within the jurisdiction or capacity of the executive officers, who were held to have transcended their powers in issuing the grants. As the entry laws were never extended to the lands in Cherokee, but, by the acts of 1783, 1819, and 1836, the entry of those lands was forbidden and other modes provided for the

disposition of them by public sales by commissioners, counsel for plaintiff admitted that this grant would be void by the general law, and relied on the resolution of 1848 as the authority for the location in Cherokee and, therefore, as sustaining the grant in this proceeding. The resolution is considered to have created an exception from the general law in favor of this claim. Such an exception is an unusual thing, and not readily to be expected, and therefore it ought to appear very clearly, by unequivocal and express language, or strong inference. If it was intended to create this single exception, it is singular that the Cherokee lands should not have been expressly mentioned in the resolution. But they were not; and it is only from general terms and by implication the attempt is made to include them—an implication which, at the
(316) best, is uncertain and unsatisfactory. It is clear they are excluded by the terms of the first clause of the resolution, which expressly provides the location, "on any of the lands of this State now subject to entry by law," and shows the actual intention to affirm the general law respecting these lands almost as clearly as if it had been said in so many words that it should not cover any part of the Cherokee territory. Against such explicit terms in the resolution it is requisite the subsequent language should be very strong and positive. It is said, however, that the second branch of the resolution is sufficient to open to this claim all the land of the State, including that in Cherokee, because it allows the location "to include any lands now belonging to the State for which the State is not bound for title," with a proviso that it shall not extend to the swamp lands. It is obvious that the construction contended for makes the two clauses of the resolution directly contradictory. That is never admissible, if it can be avoided, but it is our duty, if possible, to reconcile the different parts with each other, which may be done in this instance by construing the latter clause in reference to the first to mean "*any such* lands"; that is, lands to which the entry laws had been extended, wheresoever situated, which the State was not already bound to convey. That would allow some operation to both parts of the resolution, while the other view makes one part of the resolution repeal another, though the passage of both is but one act. It was, however, further contended that the construction claimed for the plaintiff is fortified by the proviso excluding the swamp lands from the operation of the resolution, since it implies that the swamp lands were considered to be within the terms of donation, and hence it became necessary to exclude them expressly; and if they were within those terms, so also must the Cherokee lands be. The argument is a fair one when the thing excepted
(317) by a proviso might reasonably be supposed to be within the words of the enacting part of the legislative act; and it may have much force when the enactments are in themselves dubious. But it cannot

avail much, if anything, when it is certain that the enactment would not of itself have embraced the thing excepted, and it is thence apparent that the proviso was superfluous and inefficient. In such a case the proviso may perplex, but it cannot elucidate. It is obvious, upon reading this resolution, that, like most private matters in the Legislature, this was not well understood by the draftsman, nor much considered by the members at large. The state of the law respecting the swamp lands was not duly looked into, for, if it had been, it would have been seen that by the act of 1836 the whole of the swamp lands has been vested in the President and Directors of the Literary Fund, with the power and duty to drain, sell, and convey them for the best price that could be had, as a part of a trust fund for the establishment of common schools; and, therefore, that those lands did not belong to the State in the sense of being hers without any obligation on her for the title. The proviso, then, seems to serve but little purpose in arriving at the true sense of the resolution, and leaves it to the considerations already adduced. There are, however, others which tend to raise an implication against the interpretation urged for the plaintiff. By the general law vacant lands are to be entered with the entry-taker of the county where they lie, and a warrant is to be issued by him to the county surveyor, and he is to make a survey and plat and return them to the Secretary of State within a prescribed period. Those are sworn and responsible officers, and are required thus to act as the means of preventing frauds on the State by truly ascertaining the land which ought to be granted. It should not be supposed that the Legislature meant to dispense with those safeguards against imposition, or that in this instance the land to be granted (318) should not be identified by sworn officers on the spot for the guidance of the officers at the seat of government. Yet that would be so if the resolution extended to land in Cherokee, for, as the entry laws never extended to that county, there could be neither an entry-taker nor surveyor qualified to discharge the duties belonging to those officers in other counties. The grant does not specify by what authority the person who made the survey did so; and it was not easy to conjecture upon what the Secretary proceeded in granting the particular land. Upon inquiry at the office, the information was obtained that an entry was made with the clerk of the county court, and a warrant issued by him to a surveyor who made the plat, and then a certificate given by the State's agent for Cherokee bonds that the State was not bound for title for any part of the land included in the survey—a point in which it seems that gentleman was mistaken. But the provision in the statute for the clerk's acting as entry-taker certainly would not create for him the office of entry-taker *pro hoc vice* merely, as the act has plainly within its purview a vacancy in a preëxisting office of entry-taker and intended merely to provide for

entries made with him until the vacancy should be filled, which is directed by the act to be done at the next term of the county court after the vacancy. Now, although the first part of the resolution merely authorizes the Secretary of State to issue a grant to Ailsey Medlin, and is silent as to the mode of selecting and certifying the particular tract, yet it seems certain that it was intended those facts should appear in the usual modes of entry, warrant, and survey; for the second branch of the resolution clearly denotes that by saying "that the warrant or warrants may be laid," etc. That could not be in Cherokee, and thus evinces that probably the grant was not intended to be for land in Cherokee.
(319) If, however, that should not be the correct construction of the resolution—and it is perhaps proper to say that, framed as it is, one cannot be certain of it—yet the Court is agreed that the land claimed by the defendants was not the subject of grant under the resolution, and that the grant must be held to be null in this action. The reason why grants for land, taken up as vacant within the counties to which the entry laws extend, cannot be impeached collaterally is that there is a general authority in the public officers to issue such grants, and they are, therefore, to be taken as having been rightly issued, unless that matter be directly put in issue in a proceeding to impeach them. But it has already been mentioned that it is otherwise in respect to land over which the entry laws do not extend, or in respect to which, though belonging to the State and within an entry county, some other particular mode of disposition is provided, because in these cases there is either total want of power or an excess of it in regard to the subject matter. The present seems to the Court to fall within the latter class of cases, even if it be admitted that land in Cherokee might have been taken under the resolution; for, supposing that the resolution had expressly said that the claim might be located on any land in Cherokee for which the State was not bound for title, it could not have been construed as a provision in a general statute would be which opened all vacant lands in Cherokee to entry by any citizen. On the contrary, it must be regarded as making a special gift of particular land, or of land in a specified condition, and construed as exceptions from general rules usually are, that is, strictly, or at all events fairly, towards the State and previous claimants under her. It is known that the lands in Cherokee are in various states. Much, not fit for cultivation, was not surveyed for sale. Some, which was surveyed, was put up at the sales, but not sold for want of bidders. Much was sold, and of that some has been surrendered by the purchasers, or their sureties, and accepted by the State; and some,
(320) including that now in controversy, is still held and claimed under the purchasers. It could not have been the purpose of the Legislature to give to this person land which she had before sold to another of

her citizens for a high price, paid or secured. The bounty, then, must not be taken to be of so much Cherokee land generally, but to be made in very special terms, confining the right to such portions of those lands, if included at all, as the State was not previously bound by her contract and her honor to convey to any other person; and, therefore, it is incumbent on the donee to show that his grant is for land within the particular description, or, at all events, it is fatal to it when it appears that the land is not of that particular description, but had been purchased, and that the State was justly bound to the purchaser for it.

PER CURIAM. Judgment affirmed.

Cited: Lovingood v. Burgess, 44 N. C., 408; *Barwick v. Wood,* 48 N. C., 312; *Stanmire v. Taylor, ibid,* 210; *Harshaw v. Taylor, ibid,* 514; *Barnett v. Woods,* 58 N. C., 428; *Dugger v. McKesson,* 100 N. C., 11; *Gilchrist v. Middleton,* 107 N. C., 679; *McNamee v. Alexander,* 109 N. C., 246; *Love v. Harriss,* 112 N. C., 480, 485; *Wyman v. Taylor,* 124 N. C., 428; *Dosh v. Lumber Co.,* 128 N. C., 86; *Holly v. Smith,* 130 N. C., 86; *Janney v. Blackwell,* 138 N. C., 439; *Board of Education v. Makely,* 139 N. C., 37; *Anderson v. Meadows,* 159 N. C., 408; *Westfelt v. Adams, ibid,* 419, 421; *Waldo v. Wilson,* 173 N. C., 691.

ANDREW HONEYCUT v. DANIEL FREEMAN.

In an action for malicious prosecution, where it appeared there were circumstances of a suspicious character against the defendant in the prosecution which would amount to probable cause, if unexplained, yet if these were denied and satisfactorily explained to the prosecutor, before he commenced his prosecution, he cannot avail himself of the defense of probable cause.

APPEAL from *Ellis, J.,* at Spring Term, 1851, of STANLY. (321)

Action for malicious prosecution in having the plaintiff arrested on a warrant and bound over to the Superior Court for stealing growing corn. In support of the issue on the part of the plaintiff, he gave evidence that the crop of corn in question was raised by a widow by the name of Brooks, on a piece of land for which the present defendant had brought an action of ejectment against her, in which he recovered, and thereon sued a writ of possession and had the same executed in autumn, and about three weeks before the crop of corn, being about 200 bushels, was ripe enough to be gathered; that Mrs. Brooks, on being turned out of possession, went to reside in a house belonging to the plaintiff, about half a mile from his residence and about two from her former residence; and

that when the corn became fit to be gathered, she and several of her children, who lived with her, went openly and pulled it and hauled it to her new residence, and there put it in a crib and locked it up, and the plaintiff had nothing to do with the gathering or hauling the corn, though he afterwards purchased it; that the field of corn was on a public road much traveled, and that Mrs. Brooks and her children pulled it and took it away on a Saturday and Sunday, and that during that time great numbers of people passed the road, going to and returning from a large religious meeting near the place, and saw the persons engaged in pulling and carrying away the corn; that Mrs. Brooks made her intention to take the corn publicly known, and borrowed from the plaintiff his wagon and from two other neighbors their horses for the purpose. The plaintiff then produced a witness who deposed that on Monday following he informed the defendant that Mrs. Brooks had taken the corn and had it in her crib, and also of the time and manner and all the cir-
(322) cumstances attending it, as above stated, and the defendant and witness went to Mrs. Brooks' and saw the corn there; and that the defendant, on the same day, went to the house of the plaintiff and had a conversation with him respecting the corn, and was then informed by the plaintiff that he had purchased it and claimed it; and that on the succeeding Thursday the defendant obtained a warrant against the plaintiff for stealing the corn, had him arrested and bound over; but at court the defendant made no attempt to prefer an indictment against the defendant, and he was then discharged.

On the part of the defendant evidence was then given that before taking out the warrant he was advised by an attorney that the circumstances made the plaintiff guilty of larceny in taking the corn, and that he stated the circumstances to the attorney to be as follows: That the corn had been gathered and carried away at night in plaintiff's wagon and deposited in a house of the plaintiff in a private place; that one Austin passed by as Mrs. Brooks was gathering it, and she concealed herself. But the defendant did not state to the attorney that in the conversation between plaintiff and defendant, on Monday, the former claimed the corn as before mentioned.

Counsel for plaintiff insisted that there was not probable cause, and that from that circumstance and from the variance between the facts as known to the defendant to exist, and the statement of them made by him to the attorney, malice might be inferred. Counsel for defendant insisted that there was no variance in that part of the statement relative to Mrs. Brooks hiding when Austin passed by, inasmuch as that part did not appear to be untrue.

The court instructed the jury that if they believed the evidence,
(323) the circumstances, as in fact existing, and as known to the defend-

ant when he took out the warrant, did not amount to probable cause. The question of malice was left to the jury, with directions that differences between the circumstances as they existed in the defendant's knowledge, and as he stated them to the attorney, might be considered by them as evidence tending to show malice; and the attention of the jury was then called to the several variances alleged, including that in respect to Mrs. Brooks hiding herself.

The jury found for the plaintiff, and the defendant moved for a *venire de novo* for error in the instructions to the jury, which being refused and judgment given on the verdict, the defendant appealed.

Strange for plaintiff.
Mendenhall and J. H. Bryan for defendant.

RUFFIN, C. J. Upon the point of probable cause there can be no doubt. There was not the least pretence for accusing any one of the parties concerned, and much less the present plaintiff, with a larceny. The public manner of taking the corn, with the general knowledge of the neighborhood, and the open and distinct avowal to the defendant of the fact and of a claim of property in the corn, repelled all presumption of an intention to steal. Several answers may be given to the other part of the exception. In the first place, there was evidence on which the jury might well have found the representation that Mrs. Brooks hid herself when Austin was passing, was untrue. For, when she showed herself gathering the corn for two days to hundreds of passengers along the public highway, and made her intentions known to the neighborhood generally, it is a natural inference that she had no motive for concealing herself from any particular person, and that, in truth, she did not conceal herself from that person, Austin, for which there is no evidence but the naked declaration of the defendant himself, who declined to sustain it by calling Austin. But, *secondly,* if there had been an (324) oversight on this point at the trial, it would not be a cause for disturbing the verdict, because it is totally immaterial, since, at most, it would tend to show criminality in Mrs. Brooks, and could in no degree affect the plaintiff. It is true the representation to the attorney that the corn had been secretly taken at night by some one and carried off in plaintiff's wagon and concealed in a private place on plaintiff's premises, and was in his possession, might have induced a suspicion that one so soon found in possession of stolen property had committed the theft or participated in it, without an explanation, as in fact was true and as the defendant had at the time been informed, that the taking was open and notorious and that the plaintiff had nothing to do therewith, but claimed the corn under a subsequent purchase. But with such an explanation

according to the truth, the suspicion would be altogether dispelled; and it is seen at once that the inquiry, whether the defendant maliciously prosecuted the plaintiff for a larceny of which he thus knew him to be innocent, it is entirely irrelevant whether Mrs. Brooks, while gathering the corn, with which the plaintiff had nothing to do, did or did not wish Austin not to know it.

PER CURIAM. No error.

(325)

RICHARD H. PATE v. THE GREENVILLE AND ROANOKE RAILROAD COMPANY.

1. When a person undertakes to load a boat with goods, and by his negligence the goods are suffered to fall so as to injure the boat, he is liable for the damages to the owner of the boat.
2. But where such person did not act as agent of the defendants in loading the boat, but the loading was undertaken and conducted by another person, the owner of the goods, the defendants are not liable.

APPEAL from *Dick, J.*, at Fall Term, 1851, of NORTHAMPTON.

Assumpsit for an injury done to plaintiff's boat; after the whole case had been submitted to the jury, the judge, being of opinion that the plaintiff was not entitled to recover upon the evidence, so declared, and thereupon the plaintiff submitted to a nonsuit, and appealed.

The sole evidence was that of one witness, John W. Pugh. He deposed that the railroad of the defendants terminated at Gaston, where the defendants had a large warehouse in which goods brought on the railroad to Gaston were deposited; that he, the witness, was a commission merchant and forwarding agent and resided at Gaston and had resided there about twelve years; that in November, 1849, certain goods from the town of Petersburg were brought by the defendants on their road to Gaston and deposited in their warehouse; that the said goods were marked and directed to persons residing on the river above Gaston, and were consigned to the witness as the forwarding agent of the owners; that

(326) he, the witness, employed the manager of plaintiff's boat to convey the goods from Gaston up the river to the owners, and directed the boatman to come to the wharf and take the goods on board of his boat; that the warehouse of the defendants was situated on the river bank, and a wide platform, connected with the warehouse, extended over the water, at a considerable height above the water, and was supported by a plank wall, which rose out of the water and came up to the edge of the platform; that on this platform were erected certain fixtures of

iron, to which was attached a crane, and that there was a sling of rope, to the ends of which were fastened iron hoops, into which sling the goods were put by passing the rope around the goods; that the hooks were then attached to the crane, and the crane was then slung round, so as to move the goods beyond the edge of the platform over the water; that the goods were then lowered by the working of the iron machinery into the boat underneath. The witness further deposed that he went into the warehouse of the defendants and weighed the goods, which had been consigned to him as aforesaid, and ordered the slaves of the defendants to remove the goods from the warehouse to the platform and let them down into plaintiff's boat by the crane and sling; that the goods consisted of heavy barrels, etc., weighing in all about 1,300 pounds; that the slaves were in the process of loading the sling and lowering it on the platform, while the witness was in the house, about 15 feet from them, and where he could see the operation of the hands; that the iron part of the machinery was defective, and the rope was too weak and was unsafe, though heavier freight had been let down with it; that the crane was turned off in too much hurry by the hands; that because of the haste and the bad working of the machinery the sling was turned off with a sudden fall, the rope broke and the barrels fell on the boat and destroyed it. The witness also stated that there was a stronger and sufficient rope lying on the platform, which might have been used, but was not; (327) that the fixtures aforesaid were the property of the defendants, and were kept up by them to raise produce from boats to be carried on the road, and to lower goods brought on the road into the boats on the river. The witness further stated that the defendants always had slaves as hands about the depot, to assist in raising produce from the boats and letting it down into the boat, and on this occasion the witness employed the slaves of the defendants, but the defendants never made any charge or received any compensation from him for the use of the machinery or the hands in weighing goods consigned to him or letting them down into the boats; that he took the goods out of the warehouse, weighed them, and ordered the slaves of the defendants to let them down into the boat, without the knowledge or consent of defendants' agent upon that occasion; but for years he had been in the habit of taking goods consigned to him out of defendants' warehouse, weighing them on defendants' scales and lowering them into boats, with the aid of defendants' slaves and machinery, without any objection on the part of defendants or their agent. The witness further stated that the boatman could not see the sling before it was turned off the platform, and it was usual for the hands on the platform to give notice to the boatman before the sling was turned off, but it was not done on this occasion. The witness further stated that when goods consigned to him were deposited in boats, he took

a receipt from the boatman, and then gave a receipt to the defendants for the goods; that he had given no receipt to the defendants for these goods. The witness further stated that some time since a hogshead of tobacco got injured in raising it from a boat, and the president of the company, being present, said that for any deficiency in the warehouse the company was liable.

(328) *Moore for plaintiff.*
Bragg for defendants.

RUFFIN, C. J. It was argued for the plaintiff that either as carrier or warehouseman the defendant was bound to deliver the goods on board the boat, to be taken up the river to the owners. But that point is not material to the present controversy, which is for an injury to the plaintiff's boat from unskillfulness and negligence in loading. Suppose the defendant to be thus bound: yet that would be to the owner only; and on request, and for a refusal, the plaintiff could have no action, although damage might be done to his boat in taking in the load under the direction of some one else. The question is, Who is the author of the injury sustained by the plaintiff? Whether bound or not to deliver the goods to the owner on board of the boat, if the defendant had undertaken to load the boat, and by the negligent use of an indifferent rope the goods fell and did the damage, the plaintiff might have had an action. But, in point of fact, the defendant did not undertake it. There was no request to defendant's officers to do so; but, on the contrary, the owner of the goods, or, which is the same, the consignee, selected the goods and took them under his own charge in the warehouse, and, taking the slaves about the establishment, he made them do the work under his own direction. He did not act as the agent of the defendant, it is clear; for he had received no authority as agent, and certainly, if the goods had received damage from falling into the water, he could have had no redress against the company for his own want of skill or care about his own goods; nor can the present plaintiff. It would be peculiarly hard if he could; as a sufficient rope was provided, and on the spot, by which the goods might
(329) have been let down safely, had the witness seen fit to use it. The time when the witness usually took and gave receipts for the goods makes no difference; the substance is, whether he accepted the goods and took them into his own care and disposition, and not whether he gave a receipt for them.

PER CURIAM. Affirmed.

CHESLEY DANIEL v. DAVID S. WILKERSON.

It *seems* that, although a proposition to compromise, rejected by the other party, could not be heard, yet admissions of facts, made by the defendant in the conversation with the party proposing the compromise, may be received. But there can be no doubt that such admissions are competent evidence when made to one who informs the defendant that he has no authority to compromise.

APPEAL from *Caldwell, J.*, at Spring Term, 1852, of GRANVILLE.

Action for slanderous words spoken of the plaintiff, imputing to him the crime of stealing a hog belonging to the defendant, tried on the general issue. On the part of the plaintiff a witness deposed that the defendant said to him the plaintiff had cut the hamstrings of several of his hogs, and that one of them was missing; that he had watched for the buzzards and could see none, and that he believed the plaintiff had killed and eaten the missing hog, and he intended to charge him with it as stolen property, and put the law in force against him (330) to the full extent, as he, the plaintiff, was as big a rogue as any negro in the county. The witness said, on cross-examination, that in speaking of putting the law in force he understood the defendant to mean the fence law. On the part of the plaintiff another witness deposed that the defendant, about the same time, told the witness that the plaintiff had cut the hamstrings of his (the defendant's) hogs, and had done worse than that, for he had cut a piece out of the ham of one of them, and he believed the plaintiff had killed and eaten it. On the part of the defendant it was stated in defense that he did not mean to charge the plaintiff with a felony, but meant only that he would proceed against him under the statute for keeping an insufficient fence and worrying his hogs that got into plaintiff's field; and in support of his defense the defendant gave in evidence a warrant which, a few days after the speaking of the words, he took out against the plaintiff under the fence law. Plaintiff then offered to prove by another witness that after this suit was brought the defendant stated to the witness that he had charged the plaintiff with stealing his hog, but that he did so in a passion, and was sorry for it. This was objected to by defendant, on the ground that the admission was made pending a treaty of compromise between the parties. On that point the witness deposed that he had been plaintiff's surety for the prosecution of this suit, and that defendant, under the impression, as the witness thought, that he was the agent of plaintiff, applied to the witness to have the suit compromised, and that the witness immediately informed the defendant that he was not plaintiff's agent. But the witness further stated that he expressed the opinion to the defendant that it would be settled if he would reinstate the plaintiff

(331) by paying the costs he had then incurred and would say, in the presence of some of the neighbors, that he was sorry for what he had said; and that thereupon the defendant stated to the witness that he was willing to do so, for that in a passion he had charged the plaintiff with stealing a hog, and was sorry for what he had said; that the witness made this known to the plaintiff, and he assented to compromise on those terms, but the defendant afterwards refused.

The court was thereupon of opinion that, although a proposition to compromise, rejected by the other party, could not be heard, yet admissions of facts made by the defendant in the conversation with the witness were competent evidence, and the witness was allowed to state to the jury that the defendant told him that in a passion he had charged the plaintiff with stealing his hog, and was sorry for it. The court instructed the jury that if they believed the defendant charged the plaintiff with stealing his hog, the plaintiff was entitled to recover, whether the charge was made in express terms or by implication or innuendo.

After a verdict and judgment for the plaintiff, the defendant appealed.

E. G. Reade for plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J. Although the cases upon the question of evidence are not entirely in unison, yet in some of them the distinction mentioned by his Honor is taken, and, perhaps, enough may be found in the books to establish the rule to be as laid down on the trial, if this had been a distinct admission of fact made during a treaty of compromise between the parties or their agents. But the decision of that point is at present unnecessary, because it does not seem to the Court that this can be fairly treated as an admission made upon such an occasion; for the witness said expressly that he was not plaintiff's agent, and therefore he had no authority to treat for a compromise, and that he distinctly told (332) the defendant so at the outset. It was after that the defendant made the admission as to the nature of the charge he had uttered against the plaintiff; and there seems to be no ground on which it could be distinguished from a similar declaration to any other person or on any other occasion. The witness was not even made by the defendant his agent to make a compromise with the plaintiff. He might, indeed, have expected that the witness, from his good will for the parties and his relation to them, would communicate to the plaintiff what had passed, and thus pave the way for entering upon a treaty of compromise; but he certainly did not consider that the witness had authority of any sort in the matter, for, without hesitation, he retracted everything when informed that the plaintiff was willing to make a compromise—not feel-

ing bound by anything he had said to the witness or the witness had said to the plaintiff. The case, then, seems to be simply this: The defendant, on being sued for slander, informed his friend what slander he had spoken of the plaintiff, and the circumstances under which he had spoken the words, and that he then regretted it, and was anxious to have it settled. There was no treaty then pending, or, indeed, any authority to the witness to open one; and therefore the rule as to admissions during a compromise does not apply; but the defendant's declarations are admissions with liberty to the jury to allow them such weight as to them it might seem they ought to carry from the circumstances under which they were made.

There is no error in the instructions to the jury. His Honor did not use the term *innuendo* in its technical sense in pleading, but in the popular one of artful hint or insinuation. Indeed, the use of the word was altogether superfluous, as the charge was direct, if the witnesses were believed at all.

PER CURIAM. No error.

Cited: Smith v. Love, 64 N. C., 440; *Baynes v. Harris,* 160 N. C., 308.

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(333)

PELEG W. SPENCER v. FREDERIC S. ROPER ET AL.

Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead; there is none as to the time of his death. Where a precise time is relied upon, it must be supported by sufficient evidence before the jury, besides the lapse of seven years since last heard of.

APPEAL from *Settle, J.,* at Spring Term, 1842, of HYDE.

The facts in this case were the same as those reported in *S. v. Moore,* 33 N. C., 161; and the only question was as to the time of the death of a party who had been absent seven years and not heard from, the presumption of death should apply.

Shaw for plaintiff.
Donnell for defendant.

NASH, J. When *Spencer v. Moore* was before this Court at June Term, 1850 (33 N. C., 161) an opinion was expressed by the Court, consisting of the same members as now, upon the question presented in this case. It is true that it was then incidentally before us, and the decision

of the cause was not made to rest upon it. The Chief Justice, in delivering the opinion of the Court observed: "The rule as to the presumption of death is that it arises from the absence of the person from his domicil, without being heard from, for seven years. But it seems rather to be the current of the authorities that the presumption is only that the person is then dead, namely, at the end of the seven years, but that the presumption does not extend to the death having occurred at the
(334) end, or any other particular time within that period, and leaves it to be judged of as a matter of fact according to the circumstances, which may tend to satisfy the mind that it was at an earlier or later day." So much of the opinion in the above case is transferred to this, because what was then but intimated we now express as our confirmed opinion. The cases governing this were then examined and referred to. We have again examined them, and after full deliberation see no cause to alter our opinion. In *Doe v. Nepean*, 5 Barn. & Ald., 886, the principle was more elaborately argued than anywhere else, and there it was laid down as stated above. The judgment was confirmed in error upon an appeal. 2 Mason & Wil., 894. To the doctrine so stated Mr. Greenleaf adds his authority. 1 Greenleaf Ev., sec. 41. See also, Best on Presumption, 191. As remarked by the Chief Justice in *Moore's case*, the only authority we can find conflicting with the above is *Smith v. Knowlton*, 11 N. H., 191. We do not feel justified upon it to depart from the authorities referred to. His Honor laid down the rule of law correctly according to the prayer of defendant's counsel. Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead; there is none as to the *time* of the death. If it become important to any one to establish the *precise* time of such person's death, he must do so by evidence of some sort, to be laid before the jury, besides the mere lapse of seven years since being last heard from. This we consider the settled law, and it would have been so declared in *Moore's case* but for the fact that its decision did not require it.

PER CURIAM. Affirmed.

Cited: Bragaw v. Supreme Lodge, 124 N. C., 160.

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(335)

J. M. WALKER, ADMINISTRATOR, v. ROBERT WALKER.

1. There is no rule of law which directs that a consideration is to be inferred from the fact of the execution of a sealed instrument. A deed is valid without a consideration, and therefore the law makes no inference, one way or the other, as to the consideration.

2. To rebut the presumption of the payment of a bond, the defendant proved that the defendant said to the holder, "If you will prove that it is my handwrite, and is a just note, I will pay it": *Held*, that the plaintiff was bound to show, not only the execution of the note, but also its justness, as, for instance, what it was given for, the circumstances under which it was given, etc., so as to show that it was not obtained by fraud or surprise, etc., and was in fact "a just note."

APPEAL from *Caldwell, J.*, at Spring Term, 1852, of ROCKINGHAM.

DEBT on a single bill for $40, tried on *non est factum*, payment at and after the day. On the trial it appeared that it had been executed in 1830 to the intestate of the plaintiff, payable one day after date; that the defendant had always been able to pay the amount; that it was presented to him in 1846, and payment demanded; that he denied its execution several times, but at last said to the holder, "If you will prove that it is my handwrite, and is a just note, I will pay it." Two witnesses deposed that the signature and the body of it was in defendant's proper handwriting.

Defendant's counsel moved the court to charge the jury that the plaintiff ought to prove that the said note had not been paid. The court declined so to charge, and told the jury, if the defendant promised to pay the note in question if it were proved to be in his handwriting and a just note, and they were satisfied from the testimony that it was in the hand writing of the defendant, it was sufficient to remove (336) the presumption of payment; that where the execution of a sealed instrument was proved, the law inferred that it was just and founded upon a just consideration. The jury returned a verdict for the plaintiff. Rule for a *venire de novo* because of misdirection. Rule discharged. Judgment; and the defendant appealed to the Supreme Court.

Miller and Gilmer for plaintiff.
No counsel for defendant.

PEARSON, J. His Honor charged that "Where the execution of a sealed instrument is proved, the law infers that it was just, and founded upon a just consideration." In this there is error.

We are not aware of any rule of law by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary in order to give validity to a deed. It derives its efficacy from the solemnity of its execution—the acts of sealing and delivery, not upon the idea that the seal imports a consideration, but because it is his solemn *act* and *deed*, and is therefore obligatory. No consideration being necessary to give validity to a deed, it follows that the law does not, from the fact of execution, make any inference one

way or the other in reference to a consideration. A misapprehension of this subject may have arisen from the fact that in deeds of conveyance, operating under the statute of uses, either a valuable or a good consideration is necessary in order to raise the use. But the general rule is, a deed is valid without a consideration. A voluntary bond for money, executed to a stranger, and professing on its face to be without consideration, and for mere friendship, is binding.

Another view may be taken of the case. The defendant annexed to the promise, which is relied on to rebut the presumption of payment, two conditions precedent: *First,* proof of his handwriting; (337) *second,* proof of its being a just note. But his Honor put the case to the jury in such a way as entirely to exclude the second condition and deprive the defendant of all benefit from it. He had as much right to the benefit of the second condition as of the first, and might well insist upon proof of the justness of the note; as, for instance, that it should be proven what it was given for, the circumstances under which it was given, etc., so as to show that it was not obtained by fraud or surprise, and was in fact a "just note." The promise is expressed in these words, "I will pay it, if you will prove that it is my handwriting, and *is a just note.*" By a proper construction, the latter condition may have reference to the present as well as the past. If so, the defendant had a right to insist not only upon proof that the note was just in its inception, but continued to be just; that is, had not been paid. The matter will then stand thus: Although the note was duly executed, the law presumes that it has been paid, and at the same time, according to the charge, the law, from proof of its execution, infers that it *is* just; that is, has not been paid—which inference is inconsistent and repugnant. This question of construction is not adverted to by his Honor, although it is presented by the exceptions. But it is said, according to this construction, the promise amounts to nothing. That may be so, and, if so, it only shows that the defendant was cautious, and was careful to require proof sufficient to rebut the presumption of payment which the law made in his favor.

PER CURIAM. *Venire de novo.*

Cited: Woodall v. Prevatt, 45 N. C., 201.

(338)

STATE v. JOSIAH IVES.

An indictment for receiving stolen goods must aver from whom the stolen goods were received, so as to show that he received them from the principal felon. If received from any other person, the statute does not apply.

APPEAL from *Settle, J.*, at Fall Term, 1851, of CURRITUCK.

Defendant was indicted for receiving stolen goods, and was convicted upon the following counts in the bill of indictment:

Fifth count: And the jurors, etc., do further present that the said Josiah Ives, afterwards, to wit, on 1 February, 1851, in the county aforesaid, with force and arms, one bale of cotton of the value of 10 shillings, and one barrel of tar of the value of 6 shillings, of the goods and chattels of said Caleb T. Sawyer, before then feloniously stolen, taken, and carried away, feloniously did receive and hire, he, the said Josiah Ives, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

Sixth count: And the jurors, etc., do further present, that at and in the county aforesaid, on 1 March, 1851, certain goods and chattels, to wit, one bale of cotton of the value of 10 shillings, and one barrel of tar of the value of 6 shillings, of the goods and chattels of Caleb T. Sawyer, feloniously were stolen, taken, and carried away by some person to the jurors unknown; and that the said Josiah Ives afterwards, (339) to wit, on 2 March, 1851, in the county aforesaid, the said bale of cotton and the said barrel of tar feloniously did have and receive, he, the said Josiah Ives, on the day and year last aforesaid, in the county aforesaid, well knowing the said bale of cotton and the said barrel of tar to have been theretofore feloniously stolen, taken, and carried away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

There was a motion in arrest of judgment, which was overruled. Judgment against the defendant, from which he appealed to the Supreme Court.

Attorney-General for the State.
Heath and Ehringhaus for defendant.

PEARSON, J. Defendant was convicted upon the fifth and sixth counts in the bill of indictment; and the case is here upon a motion in arrest of judgment. The fifth count was abandoned by the Attorney-General, and the question is upon the sixth count.

A receiver of stolen goods is made an accessory by the Statute of Anne; and it is provided by another section of that statute that if the principal felon escapes and is not amenable to the process of the law, then such accessory may be indicted as for a misdemeanor. This statute was so construed as to require, in the indictment for a misdemeanor, an averment that the principal felon was not amenable to the process of the law. Foster, 373. Our statute, Rev. Stat., ch. 34, secs. 53 and 54, is taken from the Statute of Anne, and has received a similar construction. *S. v. Groff*, 5 N. C., 270, and see the remarks of HENDERSON, J., in *S. v. Goode*, 8 N. C., 463.

(340) The objection taken to the indictment is the absence of an averment that the principal felon is not amenable to the process of the law; and it is insisted that, as the principal felon is alleged to be some person to the jurors unknown, it could not be averred that he had "escaped and eluded the process of the law," in the words used by our statute, and it was urged that the statute did not apply to a case of the kind.

The Attorney-General, in reply, took the position that the averment that the principal felon was some person to the jurors unknown necessarily included and amounted to an averment that he had escaped and eluded the process of the law, so as not to be amenable to justice. This would seem to be so; but we give no definite opinion, because there is another defect in the count which is clearly fatal.

After averring that the cotton and tar had been stolen by some person to the jurors unknown, the indictment proceeds: "Afterwards, etc., the said Josiah Ives, the said bale of cotton and the said barrel of tar feloniously did have and receive, well knowing the said bale of cotton and barrel of tar to have been theretofore feloniously stolen," etc. There is no averment from whom the defendant received the cotton and tar. We cannot imply that he received them from the person who stole them. It may be that he received them from some third person; and this question is presented: A. steals an article, B. receives it, and C. receives it from B. Does the case fall within the statute? We think not. The statute obviously contemplates a case where goods are received from the person who stole them; he is termed the principal felon. In the case put above, A. is the principal felon, B. is his accessory, but C. is a receiver from a receiver — an accessory of an accessory. In fact, it cannot be said whether A. or B. is the principal felon in regard to him.

(341) The statute does not provide for such a case. It makes the *receiver an accessory;* and in case the principal is not amenable to the process of law, *such accessory* may be prosecuted as for a misdemeanor. Consequently, it is necessary to point out the principal, and the matter is involved in the doctrine of "principal and accessory." This

and many other omissions are, in England, remedied by the statutes William III., and George II., by which *"the act of receiving"* is made a substantive felony, without reference to the person who stole or the person from whom the goods are received. Under those statutes the fifth count, which the Attorney-General has properly abandoned, would be good, for the offense is to "receive and have" stolen goods. We have not adopted those statutes. Of course, the decisions and forms in the modern English books cannot aid us. *S. v. Duncan,* 28 N. C., 98, presents another instance, to provide for which we have no statute.

PER CURIAM. Judgment arrested.

Cited: S. v. Beatty, 61 N. C., 52; *S. v. Minton,* 61 N. C., 198.

STATE v. JOHN MASON.

1. In an indictment, under the act of 1846-7, ch. 70, for injury to a dwelling-house, of which a lessee, his term yet unexpired, has the actual possession, the indictment, if it can lie at all, must state the property to be in the lessee.

2. But the act does not embrace the case of destruction or damage to buildings, etc., by the owner himself, and in law the lessee is the owner during the continuance of his term.

APPEAL from *Ellis, J.,* at Spring Term, 1852, of STANLY. (342)

Indictment for defacing and injuring the dwelling-house of Joshua Hearnes, contrary to the statute. The evidence was that one Bowers leased the house from Hearnes for a time and entered into possession; and when the term was about to expire and Bowers to leave the premises, he took up the flooring plank to carry it away, and at his request the defendant assisted him, knowing that Bowers was the tenant of Hearne. Counsel for defendant moved the court to instruct the jury that he was not guilty, because Bowers occupied the premises as tenant. But the presiding judge was of opinion that the act of 1846-7, ch. 70, was intended to prevent injuries to the freehold, and directed the jury upon the evidence to find the defendant guilty; and after conviction and sentence, the defendant appealed.

Attorney-General for State.
Mendenhall and J. H. Bryan for defendant.

RUFFIN, C. J. In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal. And

where the injury is alleged to be to a dwelling-house, as in burglary or arson at common law, it is always laid as the dwelling-house of a lessee who is actually in possession, and not of the reversioner. For that reason this indictment could not be sustained, if any could, for there is no ground on which, under this statute, there could be a departure from the usual mode of laying the property in the lessee and occupier. But, in truth, the facts would not support an indictment in any form, because, in the opinion of the Court, the case is not within the act; for, (343) although it protects houses and inclosures from destruction or injury, yet necessarily an exception is to be implied when the destruction or damage is by the owner. The act has in view the preservation of his estate and interest, and therefore has no purpose to restrain the owner's power over his property. The question is, Who is the owner within the meaning of the law? His Honor supposed that the object was to prevent injuries to the freehold merely, and hence that it made willful destruction by a tenant criminal. But that construction cannot be admitted, for it is neither consistent with the words nor the purposes of the act, as is obvious from the consideration that it would make it a crime in a lessee for a long term to "remove a fence" between two fields, while, on the other hand, it would allow the landlord of such a lessee willfully and maliciously to pull down with impunity the dwelling-house on the premises occupied by the tenant, which would be absurd. The act, therefore, renders criminal willful injuries by one person on the houses or inclosures of another person, and there is no reason why in this case, as in others, the property is not to be deemed in him who is at the time in the rightful possession. If it had been intended to embrace the acts of willful waste by a tenant, there would have been express words to take in the case where the premises are in the possession of the offender, as well as in that of another person, as in the modern English statute making it criminal to burn certain houses with an intent to defraud or injure any other person, whether in the possession of the accused or of another. Without some such provision, this act does not extend to waste by a tenant; and if he would not be guilty, neither can one who acts with him, by his directions.

PER CURIAM. *Venire de novo.*

Cited: S. v. Williams, 44 N. C., 200; *S. v. Gailor*, 71 N. C., 92; *S. v. Watson*, 86 N. C., 627; *S. v. Whitener*, 92 N. C., 799; *S. v. Taylor*, 172 N. C., 893.

(344)

DEN ON THE DEMISE OF JOHN L. FLORA v. SAMUEL S. WILSON.

1. A. devised the premises in dispute, as follows: "I lend the tract of land I now live on unto my wife, during the time she remains a widow." He also lends her certain slaves. "Immediately after the marriage of my widow, or directly after the death of my wife, Polly, I give all the before-mentioned estates, within doors and without, to my loving wife's heirs, by consanguinity, with the exception of Elizabeth McPherson, and I give and bequeath to her one dollar." The testator died in May, 1837; his will was proved in the same month, when the widow dissented. In August following, she intermarried with Andrew Flora, and shortly afterwards was delivered of a child, of which she was pregnant at the death of the testator. The child lived about six months and died, and within a few months after the death of that child, she had by Flora a child, the lessor of the plaintiff. The testator's wife had five brothers and sisters, who were living when the testator made his will, and when he died. The defendant is the heir, *ex parte paterna*, of the testator's posthumous child, who was the heir of the testator: *Held*, first, that the lessor of the plaintiff could not claim as heir of the deceased child, because it did not appear that he was born within ten months after the death of such child, and because, even if so born, he was only an heir *ex parte materna*, and therefore was not entitled to the land, derived to the child, either by descent or devise, from its father: *Held further*, that on marriage of the widow, the land vested absolutely in the child, and upon its death descended to its heirs *ex parte paterna*.

2. Even if the devise were contingent at first, still the lessor of the plaintiff cannot take as one of the remaindermen, because the particular estate of the mother, whether determined by her dissent to the will or by her marriage, did not continue to his birth, and consequently his contingent estate would have been defeated.

APPEAL from *Dick, J.*, at Spring Term, 1851, of CURRITUCK.

Henry Bright devised the premises as follows: "I lend the tract of land I now live on unto my wife during the time she remains my widow. I also lend negro woman Clary and child, Pleasant, Major, Sylvester, Ann, and Amanda to my wife, Polly, as long as she lives my widow. Immediately after the marriage of my widow, or directly (345) after the death of my wife, Polly, I give all the before-mentioned estates, within doors and without, to my loving wife Polly's heirs by consanguinity, with the exception of Elizabeth McPherson, and I give and bequeath to her one dollar." The testator died on 15 May, 1837, and his will was proved on the fourth Monday of that month, and his widow then dissented from it; and in August following she intermarried with one Andrew Flora, and shortly afterwards she was delivered of a child, of which she was pregnant at the death of the testator and the making of his will. The child lived about six months and died, and was the first child the testator or his wife had. Within a few months after

the death of that child, Flora and wife had issue another child, the lessor of the plaintiff. Elizabeth McPherson and four other persons were the brothers and sisters of testator's wife, who were living when he made his will and died. The defendant is the heir *ex parte paterna* of the testator's posthumous child, who was the heir of the testator. Under the instructions of the court that the lessor of the plaintiff was entitled to the premises, the jury found for the plaintiff, and after judgment the defendant appealed.

W. N. H. Smith and Jordan for plaintiff.
R. R. Heath for defendant.

RUFFIN, C. J. The Court hitherto decided on this will that Bright's posthumous child took the premises under the description of "Polly's heirs by consanguinity," as between him and his mother's brothers and sisters. *Watkins v. Flora*, 30 N. C., 374. It now appears that she had another child by her second marriage, who is the lessor of the plaintiff, and is stated to have been born a few months after the death of
(346) her child by the first marriage; and it was held by his Honor that he is entitled to the premises. It does not appear how it was supposed the lessor of the plaintiff derived title—whether as the heir of his half-brother or as a purchaser under Bright's will, within the description, "Polly's heirs by consanguinity." The Court, however, is of opinion that he cannot claim in either way, and that the premises belong to the defendant.

The premises could not descend to the plaintiff unless he was born within ten months after the death of his half-brother, according to the seventh rule of descent, and, of course, it lies on him to show his birth to have been within the period prescribed; which the Court probably would not be at liberty to infer from the vague statement that he was born "within a few months" after the death of the other. But the fourth rule of descent clearly excludes the lessor of the plaintiff from claiming by descent from his half-brother, as the latter derived the premises from his father by descent or devise, and therefore they descended from him to his heirs, who were of the blood of the father. Supposing the premises, then, to have vested in Bright's child, the defendant is entitled to them.

Nor can the lessor of the plaintiff claim under the will as purchaser. It is to be observed, *first*, that it was clearly erroneous to hold that in that character the lessor of the plaintiff was entitled to the whole of the premises, for, upon his own argument, that he was an "heir of Polly," and therefore was entitled the other child was also entitled to a moiety, and that descended to the paternal relations. Consequently, the lessor of the plaintiff could, at most, be only entitled to an undivided moiety

of the premises, and could not maintain this suit without evidence of an actual ouster from that part. But the Court is of opinion that the lessor of the plaintiff is not entitled at all under the will. The devise is to the wife for her life or widowhood, and after her death or marriage, in fee to her heirs by consanguinity, as pur- (347) chasers. That was held in the former case; and further, that the child *ventre matris* was *in rerum natura* at the death of the testator, when the will took effect, and that he took a vested estate in exclusion of his uncles and aunts, and of all others. But it is said it was thus laid down as between the first child and the uncles and aunts, and not to the exclusion of the wife's second child. The same reason, however, on which the first child took in exclusion of the wife's collateral relations made it take in exclusion of a second child; that is, that the gift over was in remainder and vested in the child *in ventre matris* immediately on the death of the testator. It is true, it was formerly held in the courts of Westminster that such a child did not take immediately under a will, but by way of executory devise. But that was overruled in *Reeve v. Long* by the House of Lords, and the point has been considered as settled ever since, as may be seen in 2 Bl. Com., 169, note, and in the cases cited in the opinion before given on this will. This is clearly not an executory devise, but a case of a plain remainder, either vested or contingent, after the death of the wife, or after her marriage, if it should first happen. It was treated before as a vested remainder, and the only question was, which of two classes of persons took under the description, who were both in being at the death of the testator. If a vested remainder at that time in either set of those persons, it necessarily followed that future issue of the wife could not come in, as there is nothing in the will to prevent its going into full effect immediately at the death of the testator. But suppose it to have been contingent at first; still the lessor of the plaintiff cannot take as one of the remaindermen, because the particular estate of the mother, whether determined by her dissent to the will or by her marriage, did not continue to his birth, and consequently his contingent remainder would have been defeated. In no point of view, therefore, could the plaintiff be entitled, and the judgment must be reversed and a (348)

PER CURIAM. [1]*Venire de novo.*

STATE v. F. GODSEY ET AL.

1. A forcible detainer is not indictable where the entry was peaceable and lawful.
2. From the finding of the jury that the defendant "*unlawfully* and with a strong hand detained," it cannot be implied that the entry was also unlawful.

APPEAL from *Caldwell, J.*, at Spring Term, 1852, of ROCKINGHAM.

Attorney-General for the State.
Gilmer and Miller for defendants.

PEARSON, J. Defendant was indicted for a forcible entry and detainer at common law. The jury found him not guilty of the forcible entry, but guilty of the forcible detainer, as charged.

(349) The judgment was arrested, and the solicitor for the State appealed.

The Attorney-General admitted, under the authority of *S. v. Johnson*, 18 N. C., 324, that a forcible detainer was not indictable at common law when the entry was peaceable and *lawful;* but he insisted that it was indictable when the entry was unlawful, although it was made in a peaceable manner.

The question intended to be made is not presented. The jury have not found that the entry was unlawful, and there is nothing from which it can be implied. It is said that it should be implied from the finding that he "*unlawfully* and with a strong hand detained." *Non constat*, for it may be that the defendant entered as a tenant at will, or for years, or *per autre vie*, and unlawfully detained and refused to give up possession after the expiration of his estate. Such unlawful detainer was clearly not an indictable offense at common law, because the entry was both peaceable and lawful, and the reversioner, if he cannot enter peaceably, is put to his action.

PER CURIAM. Affirmed.

(350)

WILLIAM E. FEREBEE v. WILLIAM R. GORDON.

If the vendor of a slave makes to the vendee, at the time of the sale, an affirmation as to the soundness of the slave, which is false within his knowledge, he is responsible to the vendee in damages.

APPEAL from *Battle, J.*, at Spring Term, 1852, of CURRITUCK.

Case for false and fraudulent representation of soundness in the sale of a negro slave. Upon the trial there was evidence given tending to show that the slave in question was unsound at the time of the sale, and that the defendant knew it. A witness was called who testified that she was present when the plaintiff purchased the slave; that she heard plaintiff ask defendant if the slave was sound, to which he replied that he was, so far as he knew; that plaintiff then inquired whether he could warrant him to be sound; that defendant said he would not, but plaintiff must take him as defendant had taken him. It appeared that defendant had purchased the slave two days before at a public sale, made by a guardian, who announced that he would not warrant the soundness of the slave, and the purchaser must take him at his risk. It also appeared that the plaintiff was at the sale and bid, and that the slave was not present when the plaintiff purchased him. Defendant's counsel contended that as the plaintiff had purchased the slave at his own risk, the reply of the defendant, when asked if the slave was sound, was not sufficient to make him responsible, even if the jury should believe that he knew the slave to be unsound, as he had not used any artifice to prevent the plaintiff from discovering the defects of the slave.

The court charged the jury, upon this point, that if the de- (351) fendant had said nothing, he would not have been responsible had he used no artifice to prevent the plaintiff from discovering the defects of the said slave; but that, as he stated the slave to be sound, so far as he knew him, if that statement were false within his knowledge, he was responsible for it, as a false and fraudulent representation. Verdict for plaintiff. Motion for a new trial; motion overruled. Judgment, and defendant appealed.

Heath for plaintiff.
Smith for defendant.

NASH, J. The charge of his Honor was entirely correct. When an article of personal property is sold with all faults, the doctrine of *caveat emptor* certainly applies. The very object of introducing such a stipulation into the contract is to put the buyer upon his guard, and throw upon him the burden of examining the article and guarding himself against all frauds, as well those which are secret as those which are apparent. But the rule never was adopted to encourage fraud and deceit or false dealing between man and man. The principles of the common law are based on morality—not an abstract or ideal morality, but one encouraging and enforcing free dealing between man and man. When, therefore, in a contract of sale the vendor affirms that which he either knows to be false or does not know to be true, whereby the other party sustains a

loss, and he acquires a gain, he is guilty of a fraud, for which he is answerable in damages. When, therefore, sued for a deceit in the sale of an article, he cannot protect himself from responsibility by showing that the vendee purchased with all faults, if it appear that he resorted to any contrivance or artifice to hide the defect of the article or made a false representation at the time of the sale. The fraud may exist
(352) either in using means to conceal the defect or in a false representation of the condition of the article. The case we are considering states that there was evidence tending to show the unsoundness of the negro at the time of the sale, and of defendant's knowledge of the fact; and it shows, also, the assertion of the defendant that he was sound so far as he knew. The questions, both of unsoundness and the *scienter*, were left by his Honor to the jury, with the direction that if the statement made by the defendant as to the soundness "was false within his knowledge, he was responsible for it as a false and fraudulent representation." We concur in this opinion, and it is sustained fully by *Schneider v. Heath*, 3 Camp., 505. The words of *Chief Justice Mansfield* are strongly applicable to this case. In the commencement of his opinion he remarks: "The words are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale these words will not protect him. There might be such fraud, either in a false representation or in using means to conceal some defect." See, also, 2 Steph. N. P., 1283; *Millish v. Motteux*, Pea. N. P. Cases, 156.

No error is perceived in his Honor's charge, and the judgment is affirmed.

PER CURIAM. No error.

Cited: Lunn v. Shermer, 93 N. C., 169; *Whitmire v. Heath*, 155 N. C., 307.

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(353)

WILLIAM SLADE v. JOSEPH H. ETHERIDGE.

1. In ascertaining the boundaries of a grant, when a point is described as being a given distance from a certain other point, a direct line is implied, unless there be something to rebut the implication.

2. The circumstance that both points are on the same river has no tendency to destroy the implication.

APPEAL from *Dick, J.*, at Spring Term, 1852, of MARTIN.

Trespass quare clausum fregit. Plaintiff claimed title under a patent to Slade, which patent was bounded on the north by the second line of a

patent to one Taylor, under which the defendant claimed. The last-mentioned patent calls to begin at a gum on Roanoke River, half a mile below Quitsny. The gum could not be found.

Plaintiff proved that many years since there was a landing called Quitsny, which was on the Bertie side of the Roanoke River. He further proved that persons crossing the river at this landing landed on the Martin side of the river, at a large oak, which stood nearly opposite to the landing, which place was also called Quitsny. He further proved that Lewis Bond, an old man, now dead, and who was at one time the owner of the land at the oak on the Martin side, told the witness that the place where the oak stood was called Quitsny. It was also proved that the oak has since been cut down, but the stump is still remaining. Defendant then proved that a sycamore on the bank of the river was the termination of the third line of the Taylor patent, and the fourth corner of said patent; and he contended that the stump aforesaid had not been satisfactorily proved to be at Quitsny landing, and prayed the court to instruct the jury that it was their duty to begin at the sycamore and reverse the lines of the Taylor patent as the only (354) means of ascertaining where the true lines of the Taylor patent were. Defendant also requested the court to instruct the jury that, supposing they found Quitsny, to be at the stump before mentioned, it was their duty to run a direct line so as to strike the bank of the river half a mile below Quitsny, and in that way to ascertain the beginning corner of the Taylor patent.

The court refused the instructions prayed by the defendant, but charged the jury that it was for them to decide whether the plaintiff had laid before them sufficient evidence to satisfy them that the stump aforesaid was at the place called Quitsny in the Taylor patent; and if it was proved that the stump was on the margin or bank of the river, then, as the last call of the Taylor patent was from the sycamore down the river to the first station, it was their duty to follow the margin of the river from the stump half a mile down the river, in order to ascertain where the gum, the beginning corner of the Taylor patent, had stood.

Verdict for plaintiff. Rule for a new trial; rule discharged. Judgment; and defendant appealed to the Supreme Court.

B. F. Moore and Asa Biggs for plaintiff.
P. H. Winston, Jr., and W. B. Rodman for defendant.

PEARSON, J. The case turned upon the location of the beginning corner of the grant to Taylor. The grant begins at a gum on Roanoke River, *half a mile below Quitsny,* and the third call is for a sycamore

on the bank of the river, thence down the river to the beginning. It was proved that a black-oak stump on the bank of the river was at a landing, and was the place called "Quitsny." The gum could not be found.

Defendant's counsel requested the court to instruct the jury that "it was their duty to run a *direct line* so as to strike the bank of the river half a mile below the stump, and in that way ascertain the location of the gum or beginning corner."

(355) The court refused so to charge, but instructed the jury, "That as the last call of the Taylor grant was from the sycamore down the river to the first station, it was their duty to follow the margin of the river from the stump half a mile down the river, in order to ascertain where the beginning corner had stood."

In this there is error. When a point is described as being a given distance from a certain other point, a *direct line* is implied, unless there be something to rebut the implication. We are not able to perceive how the fact that the stump, in this case, stood on the river, and the gum also stood on the river a half mile below, has any tendency to show that a direct course is not to be adopted. If one is traveling by water, and asks the distance to a certain place, also on the water, we are apt to tell him according to the course of the stream. If he is traveling by land, we are apt to tell him the distance according to the course of the roads. But surveyors and mathematicians speak of distances according to straight lines, and are always so to be understood unless there is something to show to the contrary.

His Honor was of opinion that the last call, being from a sycamore on the river, *down the river* to the beginning, justified a departure from a direct line. That is true in reference to the last or "closing line" of the grant; but it has no bearing on the line from the stump to the gum. This latter line constitutes no part of the boundary, but is merely given to fix the location of the beginning corner; so the closing line has nothing to do with it.

PER CURIAM. Reversed.

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(356)

BUSHROD W. BELL v. WILLIAM D. JEFFREYS.

A warranty of the soundness of a slave includes in it a stipulation that there is no defect in an eye so as to make it unfit for ordinary purposes, and, therefore, if the slave is near-sighted, there is a breach of the warranty.

RUFFIN, C. J., dissenting.

APPEAL from *Ellis, J.*, at Special Term, in June, 1851, of WAKE.

Assumpsit upon the warranty of a female slave to be "sound and healthy." Plaintiff contended that the slave was defective in her vision. The proof tended to show that it was a case of near-sightedness, and the court was asked to instruct the jury that if that was the defect complained of, it was not a case covered by the terms of the warranty. The court declined to give this instruction, and told the jury that although it was a case of near-sightedness, if they believed from the evidence that the slave was thereby rendered incapable to perform the common and ordinary business in the house or field which slaves are taught and expected to perform and are usually required of them, the defect was an unsoundness, and the plaintiff was entitled to recover damages, etc. The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Busbee and G. W. Haywood for plaintiff.
A. W. Miller, B. F. Moore, and McRae for defendant.

PEARSON, J. Plaintiff paid a sound (fair) price for the slave, (357) and the jury find that by reason of a defect in her eyesight she was unfitted for the services ordinarily expected of slaves. Plaintiff further endeavored to protect himself by requiring a warranty, in which not merely one word, which is usually considered sufficient, but two words, *"sound* and *healthy,"* are used, for the purpose of binding the defendant, and protecting the plaintiff from loss. The word *"healthy,"* in its ordinary acceptation, means free from disease or bodily ailment or a state of the system peculiarly susceptible or liable to disease or bodily ailment. The word *"sound,"* when superadded and contrasted to *"healthy,"* in its ordinary acceptation, having reference to *animals,* means "whole," "right," nothing "wrong," "nothing the matter with it," "free of any defect by which it is unfitted for the services usually performed by animals of the like kind." This definition is derived from the decided cases, in which such is held to be the meaning of the word in its ordinary acceptation when used in reference to animals. *Simpson v. McKay,* 34 N. C., 142, and see many cases cited by Oliphant on Horses, Law Library. When used in reference to wood or vegetables, or other inanimate substances, "sound" means free of decay or rottenness. When used in reference to animals, and applied to the mind, it means that neither from nature or disease, nor other causes, the mind is incapable of performing its ordinary functions. When applied to the organs of seeing, hearing, smelling, etc., it means that the organ, neither from nature, disease, nor other cause, has any defect which makes it incapable

or unfit to perform the services ordinarily required of it. A horse that has had his eyes knocked out, and has got well, is healthy and free of disease or bodily ailment. But can it be said that it is a sound horse? He has lost the organ of sight, and is less fit for service. When applied to the body or outward structure of an animal, it means that there is no malformation, and that the structure of the body has undergone
(358) no change, either from disease or accident, whereby to render it less fit for service. But it does not import that the structure of the body of the animal is perfect and free of defect, for there is no model. Who can say what is perfection in the form of a horse? Some are so formed as to fit them for speed, with light weight; others for heavy burden at a slow pace. Either, put to the service of the other, would sink under it. Some are thick through the chest, others thin. Some carry their heads high, others are "cur-necked." Some have high hips, others are droop-rumped, cat ham'd, with crooked legs, indicating an easy gait to the rider and unfitness for harness. Some are white, others bay, and so on, through all the varieties of forms and color, as if they were so made to suit purchasers. So a slave may be tall or low stature, or bow-legged, or knock-kneed, or stoop-shouldered. In regard to these matters, therefore, the rule of *caveat emptor* applies, and purchasers are to consult their own taste or judgment, for there is *no model* of perfection. But, in regard to an organ —the eye, for instance—there is perfection, and if there be a defect in it, so as to make it unfit for ordinary purposes, the animal is unsound. Near-sightedness, therefore, is an unsoundness, because it is a defect in an important organ. It may be produced by disease or accident, or by looking much at small objects, and may be transmitted from parent to child. In regard to this, a distinction was taken in the argument by *Mr. Moore* between a defect caused by disease or accident and one from nature, but the distinction is not a sound one. If one sells a blind horse, does it make any difference to the purchaser whether he was born blind or had his eyes knocked out? In this case, where the plaintiff bought a female slave, the unsoundness impaired the value to a greater extent if it was hereditary, be-
(359) cause it was more likely to fall upon the issue, than if it had been caused by accident. But it is said by *Mr. Moore* this negro can see as well as many old negroes, and will it be held that a negro is unsound who can't see as well as he did in the prime of life? Certainly not. When one buys an old negro and takes a warranty of soundness, if the eyes of the negro have not been injured by disease or accident, and are only impaired by the "wear and tear" of age, the purchaser has no right to complain, for the slave is sound, in the ordinary acceptation of the word used in reference to one of that age, because courts, jurors, pur-

chasers and every one are presumed to know the laws of nature, and contracts are to be construed in reference to such knowledge.

RUFFIN, C. J., dissenting: Myopia, or shortness of sight, is, undoubtedly, an imperfection or defect; and it may be so to such an extent as to impair the capacity for the usual handicrafts, and therefore diminish the value of a slave. If this, then, had been an action for a deceit in knowingly concealing this defect, and the *scienter* had been established, the plaintiff ought to recover; and in that case the price given would be material evidence, as raising a presumption that the defect was or was not disclosed, and also as arising in the estimate of the damages. But the action is not of that kind, but is assumpsit upon a parol special contract of warranty that the slave was "sound and healthy"; and the single question is whether the slave was rendered unhealthy or unsound by the blemish or defect mentioned, so as to amount to a breach of that contract. It is not supposed by any one that it is so in respect of the term "healthy." But it is held to be so within the other term, "sound." To me, however, it appears otherwise, and, in the absence of any opinions of medical men, I must so hold. There is no model of a perfect eye, and there are so many degrees in the power of vision, when that organ is in its natural state, as to render it impossible to say that an (360) eye, not having any disease whatever, is *"unsound"* because the person may not be able to see as far, or objects as small, as to look as intently and for as long a period as some other persons. It is known that there are more myopic persons among the more educated and refined classes than in others, and many more among the white than the black race, according to their relative numbers. I never knew of a white person rendered unfit for the offices of life by this defect of vision; at least, not so far as not to be within the remedial operation of glasses; and I confess it never occurred to me to call such a person unsound, or to consider that defect different from that of a failing of the sight from age. In neither case is the sight as good as it might be; but the organ is in its natural condition, and the subject of no malady whatever. Indeed, there is a difference in favor of one having shortness of sight, as that diminishes with the person's age, while the decay of vision in an eye once good is seldom, if ever, arrested, and gradually increases by the efflux of time merely. It must be remembered that it is not the degree of imperfection in the vision which can constitute it "unsoundness"; for if shortness of sight is unsoundness at all, any shortness of sight, less than that of the majority of mankind, must amount to it, and the degree of it only measures the extent of the unsoundness and the damages. It is the extravagance of that proposition, and the difficulty of applying it with any reasonable certainty and uniformity to persons and contracts,

which makes me withhold my assent from it. On the contrary, the safe rule seems to me to be that an animal is to be taken as *sound* of body each of whose organs is exempt both from decay or present disease.

PER CURIAM. No error.

Cited: Harrell v. Norvill, 50 N. C., 31; *McLean v. Waddill, ibid.*, 139; *McKinnon v. McIntosh*, 98 N. C., 92; *Wrenn v. Morgan*, 148 N. C., 105; *Robertson v. Halton*, 156 N. C., 220; *Hodges v. Smith*, 158 N. C., 260; *Tomlinson v. Morgan*, 166 N. C., 560.

(361)

ELIZABETH WALTERS v. CLEMENT H. JORDAN ET AL.

1. Under our statute (Rev. Stat., ch. 121, sec. 11) barring the claim of an adultress for dower, "if she willingly leave her husband and go away and continue with her adulterer," although the wife doth not continually remain in adultery with the adulterer, yet if she be with him and commit adultery, it is a "continuing" within the statute; and if she once remain with the adulterer in adultery, and he afterwards keep her against her will, or if the adulterer turn her away, she shall still be said "to continue" with the adulterer, within the statute.

2. There may not be any adultery before the wife leaves her husband, nor an elopement with the man with whom she afterwards committed adultery, but she is barred by adultery with any person, supervenient upon her willingly leaving her husband.

3. But, in order to support, under this statute, a bar to the claim of dower, it must appear that the wife *willingly* left her husband. If driven away by him or by his compulsion, the wife does not forfeit her dower.

4. It is immaterial whether the adultery was committed before or after the separation.

PEARSON, C. J., dissenting.

APPEAL from *Caldwell, J.*, at Spring Term, 1852, of PERSON.

PETITION for dower. The defendants pleaded in bar that the plaintiff willingly left her husband and went away and lived in adultery with a certain negro slave, without any reconciliation. On the trial evidence was given on the part of the defendants that the husband and wife were living apart, and that a few months after the separation he filed a bill against her for a divorce for cause of adultery with a certain negro, by whom she became pregnant of a child, of which she was afterwards delivered. When the copy of the bill was served, it was read to her by the witness, who asked her if it was so, and she held up the child and said it would show for itself; whereupon the witness stated he

thought it was a negro child, and asked her if it were not; and (362) she replied that she was not the first white woman that negro had taken in; that when he first came about her, she hated him, but that after a while she loved him better than anybody in the world, and she thought he must have given her something; that the witness then said he did not blame her husband for what he had done; and she replied she did not blame him for anything except that he drove her off before he knew whether it would be a black child or not; and the witness remarked that she supposed he had good reasons to believe it. On the part of the defendants further evidence was given that the husband and wife had been married and lived together several years, until three or four months before the husband's death, and that upon the separation the wife went to the house of another person to stay; and evidence was also given tending to show, as it seemed to the court, that after the separation the plaintiff committed adultery with a negro man, and that she continued apart from her husband, without any reconciliation, until his death, and since that time has been a lewd woman.

On the part of the plaintiff a witness deposed that on the day of the separation the husband sent for him, and as he was going to the house he met the plaintiff coming away in tears, and that when he got there the husband told him that he had understood his wife was pregnant by a negro man, and he had driven the strumpet off, and she should never live with him again.

Counsel for defendant moved the court to instruct the jury that if the plaintiff cohabited with a negro man before the separation, and that came to the husband's knowledge, and was the cause of the separation, the plaintiff did willingly leave her husband within the meaning of the law, and was barred of her dower, although the husband ordered her away. The court refused to give the instruction as prayed (363) for, and told the jury that if the husband ordered her away, though for the cause of adultery, she could not be considered as willingly leaving her husband within the meaning of the act, and would not be barred of her dower, though she had committed adultery.

The counsel then prayed the court to instruct the jury that there was evidence that the plaintiff continued with her adulterer after having left her husband. The court refused to give the instruction, and told the jury there was no evidence that she continued with her adulterer, within the meaning of the law.

Counsel for the defendant further prayed the court to instruct the jury that if the plaintiff was guilty of adultery, without the sanction of her husband, the manner of her going away from him, whether by or without his orders, made no difference; and also that the mere manner of her remaining apart, whether in adultery or not, made no difference; that

adultery, without the sanction of the husband, was a bar to the plaintiff's right of dower, and that nothing removed it but reconciliation. The court refused to give the instructions as prayed, but instructed the jury that the act of separation must be voluntary on the part of the wife, and that there must be a remaining away and a continuance in repeated acts of adultery in order to bring the case within the meaning of the law, and that a single act of adultery with her adulterer after the separation was not sufficient to bar the plaintiff.

The jury found the issue for the plaintiff, and after a judgment and award of the writ, an appeal was allowed to the defendants.

Norwood for plaintiff.
E. G. Reade for defendants.

(364) RUFFIN, C. J. If the case depended upon the correctness of the latter parts of the instructions, the judgment would be reversed, as Lord Coke states very explicitly in 2 Inst., 435, that albeit the wife doth not continually remain in adultery with the adulterer, yet if she be with him and commit adultery, it is a tarrying within the statute 13 Ed. I., ch. 34, which is reënacted in Rev. Stat., ch. 121, sec. 11; and that if she once remain with the adulterer in adultery, and after he keepeth her against her will, or if the adulterer turn her away, yet she shall be said *morari cum adultero* within the statute. *Hetherington v. Graham*, 6 Bing., 135, is also a clear authority, and upon sound reason, that there need not be any adultery before the wife leaves the husband, nor any elopement with the man with whom she afterwards commits adultery, but that she is barred by adultery with any person, entirely supervenient on a separation by mutual consent. There was evidence which, in the opinion of the court, tended to prove an act of adultery with a negro after the separation, though he is not identified to be the same one with whom the plaintiff was guilty while living with her husband; and that case the authorities show to be within the statute, provided it was also within it in respect to the cause of her leaving her husband and his house. As to that, it seems clear upon the evidence, and stands admitted in the first part of the instructions prayed, that the husband ordered or drove her away. That being so, it appears to the Court that the plaintiff cannot be said to have willingly left her husband; but that, on the contrary, she left him against her will, and by *his* compulsion, and therefore the case is not within the act, though she afterwards committed adultery with a new or former adulterer. That being so, all the other instructions became immaterial, and any error in them ought not to produce a reversal of the judgment.

The words of the act are in the conjunctive, and plain in themselves; and in such a case it would seem to be the province of the court to receive and carry them into execution, according to their obvious meaning. Therefore, apparently, the ingredient that the wife should willingly leave her husband was in every case essential to the bar of the dower given by the statute. But it is yielded that, as our statute is but a reënactment of an ancient one in England, the interpretation put on the original judicially, or by a commentator so wary and wise as Lord Coke, ought to be authoritative as to the construction of ours. Some passages in Lord Coke's reading on the Stat. West. II., have been relied on to show that it is not material whether she left the husband willingly or not; and hence it is inferred that even the compulsion of the husband makes no difference. But the passages do not seem at all to authorize that inference. They are that "Albeit the words be in the disjunctive, yet if the woman be taken away, not *sponte,* but against her will, and after consent, and remain with the adulterer, etc., she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry"; and then he states a case in which a man had made a sale and conveyance by deed of his wife to another man, whereon it was pleaded in bar, to a writ of dower, *quia recessit a marito suo in vita sua, et vixit ut adultera cum,* etc.; and upon a demurrer to a replication of the husband's deed, it was adjudged for the defendant. Now, those two cases are entirely distinct from the present, and seem no way analogous to it. In the latter case there was no compulsion on the wife by any one—either the adulterer or the husband. Nothing like it can be implied from any part of the pleadings, the deed, or Lord Coke's statement. But the contrary is apparent, namely, that the woman went willingly, for it is stated, just after the passage above quoted, and in contrast with it as a case in which she left *sponte,* while in the other it was otherwise; the words being, *"if the wife goeth away"*—not by compulsion of her husband, but with her husband's consent, and agreement with A. B., and after A. B. (366) commit adultery with her and she remains with him, she shall be barred of her dower." That, therefore, is only a case where both parties were willing she should leave, and, in fact, it was as much the wife's act as the husband's, and was, indeed, the authority on which that precise position was adjudged in *Hetherington v. Graham, supra.* The defendant's case seems to derive as little support from the other passage. The case under Lord Coke's consideration was obviously that of the forcible abduction of a woman by some other man, contrary alike to her own and her husband's will, and her consent afterwards to live in adultery with her violator; and it is in reference to that case it is said she loses her dower, for the cause of the bar of *her* dower is not the

manner of the going away, but the remaining with the adulterer. That is founded on good reason; for the husband was in no manner accessory to her dishonor, and she did finally, though not at first, consent to it. But it cannot be supposed that Lord Coke would put on the same footing a case in which a husband aided in forcing his wife to submit to the violation of her person by one who took her away against her will, though, after her degradation, she might continue to live with the ravisher. Nor can it be more reasonably collected as his opinion that any case of compulsory expulsion of the wife by her husband could possibly be deemed her leaving and going away willingly. The two propositions are directly contradictory in terms; and no one could suppose such a case within the words or meaning of the law, if the expulsion were wanton and unprovoked. In such a case the subsequent adultery would be regarded as a natural consequence of the husband's wrong, and he could take no benefit from it nor deprive his wife of any.

But it is said this was not a wrong done to the woman, but it was an act merited by her depravity and baseness, and demanded by his honor; and it is true there could be no greater injury inflicted on the (367) rights or feelings of the husband than that perpetrated by this woman. But the Court has no right to be wise beyond the Legislature, and make a law for a hard case, nor, which is the same thing, bring such a case within the statute the words of which will cover it, and which was made *diverso intuitu*. The laws must be framed and construed upon general principles, and not vary to meet contingencies not in the contemplation of the Legislature. Therefore, the construction of the act cannot be influenced by the fact that the husband drove this woman away, by reason that committing the particular adultery, which was her offense, she descended to the lowest depths of infamy, more than if it had been for any other cause, as drunkenness, profanity, ungovernable temper, furious passions, and violent assaults, which rendered her society an intolerable annoyance and made his life burdensome. Now, for these several acts a husband may be more or less excusable in the eye of morality and the law in refusing to cohabit with his wife and expelling her from his house, so as to have it in quiet to himself and the other members of his family. But that is not the point. It is, on the contrary, very different. By the common law a wife was entitled to dower, though she were an adultress. A statute was then made whereby she was not deprived of dower merely by committing adultery, but was barred of it if she willingly left her husband and afterwards lived away from him and committed adultery. Adultery previous to her elopement or departure is not alluded to in the statute, and cannot control the construction. If that had been intended to be a bar, or to affect the bar, why did not the statute confine itself at once to adultery simply? Instead

of doing so, the object of the act is adultery subsequent to the willing leaving of the husband. It was very fairly argued at first that the case contemplated in the act was not only that expressly mentioned, in which the wife willingly left the husband, but that also the unworthiness of the husband was to be implied. That, however, is settled other- (368) wise, and it is held that if they concur in separating, the case is within the act. But no case can be found in which the woman did not leave the husband willingly, but did so unwillingly, and, moreover, by the compulsion of the husband himself, in which it was held against the wife, nor is there any *dictum* to give color to the proposition.

PEARSON, J., dissenting: A wife, detected in adultery, is ordered by her husband to leave his premises. She does so, and continues to live in adultery. Is her right of dower forfeited?

Whenever the wife lives in adultery, separate and apart from her husband, without his default, dower is forfeited.

Adultery is the offense which causes the forfeiture. But it may seem that to allow an inquiry to be instituted as to the adultery of the wife in every case after the death of the husband would tend greatly to disturb the peace of families, and lead to very mischievous consequences. From motives of policy, therefore, the lawmakers deemed it wise to restrict the forfeiture to cases where the wife lived separate and apart from her husband. If the parties lived together, it was thought expedient to let the scene close at the death of the husband, and to exclude the heir from all inquiry as to the conduct of the wife which had not been complained of by his ancestor; for, supposing her guilty, if it was known to the husband, and he continued to admit her to his conjugal embraces, he was not fit to have the protection of the law; if it was not known to him, it would be apt to rest on slight and unsatisfactory evidence, and it was wise not to allow an investigation to be instituted.

Where there is a separation without the default of the hus- (369) band, and the wife continues to live in adultery, the manner of the separation is obviously immaterial. This construction of the statute is, in my opinion, sustained by the reason of the thing, by analogy, and by authority.

It is said the terms of the statute confine it to the case of a wife who "willingly leaves her husband and goes away and continues with her adulterer." These are the words used. The question is, Are we to stick literally to the words and consider the statute as providing only for a single case, or are we to give it a liberal construction, and consider it intended to establish a principle, and as citing one instance merely out of many included in it?

The greater includes the less. This is an axiom in mathematics, and it is equally true that, in the construction of a statute, where a less offense is denounced, a greater offense of a like kind must necessarily be included in the denunciation.

When a wife loses the affection of her husband and elopes with the seducer, an abhorrence of the crime is mitigated to some extent by a feeling of pity for the unfortunate victim of passion. But when a wife transfers her affections to another, and nevertheless continues to live with her husband, and receive from him protection and support, but is ready at all times to slip away and fly to the embraces of another, and then return and pollute the bed of one whom she injures and deceives, our detestation of the wretch is unmitigated. Can it be that a statute which deprives the one of her right to dower does not apply to the case of the other, because the injured husband finds himself compelled to order the guilty wretch to leave his house, and she goes away and continues in her guilt? Surely this construction cannot be put on it without doing violence to the intention of the lawmakers. It holds out a reward to baseness, for, after her detection, it says, "Add baseness to crime, confront your injured husband, refuse to go away, so as to make it necessary for him to order you to leave, and you are at liberty then to go and continue in guilt, and the law protects your right of dower!"

(370) Under such circumstances the wife does, in contemplation of the law, "leave willingly." She willingly does that which is the necessary consequence of her own act as much so as one is said willfully to burn my house if he sets fire to an adjoining house, the natural and necessary consequence of which is to burn mine. It cannot in such a case be said that the husband is in default. He does only that which the law *allows, expects,* and *requests* him to do. She causes the separation, and "leaves willingly," to all intents and purposes.

This construction is sustained by authority. Rev. Stat., ch. 39, sec. 2. If a wife separates herself from her husband and lives in adultery, it is a cause for divorce from the bonds of matrimony. "Separates" is an active verb, implies volition on the part of the wife, and is synonymous with "willingly leaves." It is clear that adultery on the part of the wife while living with the husband is not a cause of divorce from the bonds of matrimony. But if in consequence thereof he drives her away, and she afterwards lives in adultery, it is settled to be sufficient cause of divorce, for she has, in contemplation of law, separated herself from her husband. As these statutes are upon kindred subjects, there should be a conformity in the construction, especially as an effect of a divorce from the bonds of matrimony is the loss of dower.

This construction is also sustained by the authorities. Adultery is a bar to dower, though committed after the husband and wife have sepa-

rated by mutual consent. *Hetherington v. Graham*, 19 Eng. C. L., 31. This case is stronger than the one under consideration. Here the husband is in no default; there he was, because the wife had done no wrong, and he violated his duty to her by giving his consent that she should live separate from him, whereby she was exposed to (371) temptation. In *Coote v. Berty*, 12 Mod., 232, to a plea that the wife had forfeited dower by living apart from her husband in adultery, it was replied, the husband, by his deed, consented to her to live in adultery. It was held that her dower was forfeited. In *Paynell's case*, referred to at length in 2 Inst., 434, to a like plea in bar of dower, the demandant relied on the fact that the husband had, by deed, delivered over, given and granted his wife to Sir William Paynell; it was held she was not entitled to dower. The case does not state whether the wife consented to be thus delivered over and transferred to another, or that she was consulted in respect to it. The inference is that she had been guilty of adultery, and in those times, when force was more common than fraud, the wife had not the impudence, the baseness, and did not dare to confront her husband, so as to make it necessary for him to tell her to leave his premises. She had fled from his wrath, and the indignant husband took this mode of getting clear of her.

The statute uses the words "willingly leave, go away, and continue with her adulterer."

It is remarkable that these words have not been adhered to in any one particular. It was at one time insisted that the wife must *go away with her adulterer.* It was decided that it made no difference whether she went away with him or some one else, or went by herself.

So it was insisted that she must *continue with* her adulterer. It was decided that it made no difference whether she continued in adultery with him or committed the crime with another or with divers others. These cases are referred to in the opinion of *Tindall, C. J.*, in *Hetherington v. Graham* (he also refers to a case in Britton, whose book was published immediately after the framing of the old statute, from a translation of which ours is copied), "in which no mention is made of a leaving of the husband, either willfully or with any particular person, but the plea states only that the wife was *living apart from her husband in adultery.*"

In 2 Inst., 434, Lord Coke, commenting upon the words in the (372) statute, *sponte*, etc., says, "Albeit the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and after consent and remain with the adulterer, without being reconciled, etc., she shall lose her dower; for the cause of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry, etc., that is the bar of the dower." At page 436

he says, "The words *reliquerit et abierit* are not of the substance of the bar of dower, but the adultery and the remaining with the adulterer."

Compare the case in Coke with the case before us. An innocent wife is ravished and by force taken away from her home. After the violence, despairing of ever regaining her former position, she consents to remain with her ravisher; yet her dower is forfeited. What becomes of the words *"sponte,"* "willingly leave?"

Do not these authorities sustain the construction that the manner of leaving and going away is not of the substance? If the statute is so construed as to include a wife who is ravished and taken away by force, *a fortiori,* as it seems to me, it must include one who is guilty of adultery and is base enough to make it necessary for the husband to order her away.

PER CURIAM. No error.

Cited: Leonard v. Leonard, 107 N. C., 172.

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(373)

STATE v. BILL, A SLAVE.

1. Under the provisions of section 41, chapter 111, Revised Statutes, the justice of the peace before whom a slave is brought, charged with an offense not capital, must decide whether the offense is of such a nature as to require a greater punishment than he is authorized to inflict, and shall give judgment accordingly.

2. In such a case an appeal is allowed by the act of 1842, ch. 9, sec. 1, to the county court, which may decide without a trial by jury. No appeal from that court to the Superior Court is authorized by law.

3. When the proceedings of an inferior tribunal are not according to the rules of the common law, the aggrieved party is entitled to a *certiorari;* but only to have them reviewed as to matters of law.

4. If a party, entitled to an appeal from an inferior to a superior tribunal, is denied that right, or deprived of it by fraud, or accident, or inability to comply with the requirements of the law, he is entitled to have his whole case, both as to law and fact, brought up by *certiorari,* and to a trial *de novo* in the Superior Court.

APPEAL from *Dick, J.,* at February Term, 1852, of MARTIN.

Attorney-General for the State.
Asa Biggs and B. F. Moore for defendant.

NASH, J. These proceedings have been instituted under ch. 111, sec. 41, Rev. Stat. The slave was arrested under a warrant duly issued by a

single magistrate. The offense or misdemeanor charged therein was for being found in the night-time secreted under the bed of the prosecutor, and, to evade any charge of a serious nature as to his intentions, that he falsely made charges to excuse his being there, highly slanderous to the character of a female of the family. The precept was (374) properly returned, and the magistrate adjudged that the slave should be punished by receiving a number of lashes. From this judgment the owner of Bill appealed to the county court. There a motion was made, in behalf of the slave, that the charge should be tried by a jury. This was refused by the court, and judgment being pronounced upon Bill, his master prayed an appeal to the Superior Court, which was allowed. In the Superior Court the presiding judge dismissed the appeal, as having been improvidently granted, and ordered a *procedendo* to issue to the county court. A rule was then obtained upon the Attorney-General to show cause why a *certiorari* should not issue to bring up the proceedings, which, upon argument, was refused, and the owner of Bill appealed to this Court.

His Honor committed no error in refusing to issue the writ required. There is no doubt but that it was within the judicial power of the court to have ordered a *certiorari*. Where the proceedings of an inferior tribunal are not according to the rules of the common law, a party conceiving himself aggrieved by its decision is entitled to a *certiorari ex debito justitiæ*, to bring them up to be reviewed in the matter of law, as in other cases, on a writ of error. But in such cases the writ is never granted except for an error in law. The allegation on the part of the owner of the slave is, if the law allowed no appeal in such a case from the county to the Superior Court, then, from necessity, he was entitled to the writ for which he asked. That is true *sub modo*. Where an appeal is granted in a proper case, from an inferior to a superior tribunal, it takes up the whole cause in general, and the trial is *de novo*. If the party complaining has been denied this right where it exists, or deprived of it by accident or fraud, or inability to comply with the requirements of the law, he may have his whole case reviewed by a *certiorari*, both as to matters of law and fact; and where the (375) right of appeal is not allowed there, the aggrieved party is still entitled to have his case revised by a superior tribunal; but only on points of law. If the county court erred in granting the appeal to the Superior Court, the latter tribunal had no jurisdiction over the cause, and the appeal was properly dismissed; and if the county court committed no error in those proceedings, and that appeared on the record, as shown by the applicants, his Honor rightly refused the *certiorari*. It is necessary, then, to look to the various statutes regulating proceedings of this kind.

The acts of our Legislature on the subject of slaves are mostly police regulations. Blackstone, 4 Com., 162, defines public police and economy to be the due regulation and domestic order of the State, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners. As early as 1741 the Legislature found it necessary to legislate on this subject, and from time to time, down to the present, laws regulating the conduct of slaves have been made. It is unnecessary to trace out this legislation step by step, but it is gratifying to remark how its spirit has kept pace with the progress of the times, and if on our statute-book some few acts are retained which we could wish to see abandoned, still the spirit of our modern legislation is to moderate the evils of slavery and to protect the safety and the rights of the slaves themselves.

The act of 1741 secured to the slave the right of appeal, through his master, from the judgment of a single magistrate to the county court, when tried for the offenses therein set forth, and that act has several times been reënacted. In 1783 the act was passed under which the proceedings are had in this case, and it is reënacted in the Revisal of 1836. It provides that when any slave shall commit any misdemeanor or offense which is not by law declared capital, and which, in the
(376) opinion of the justice or justices before whom such offending slave may be carried for examination, shall appear to be of so trivial a nature as not to deserve a greater punishment than by that act a single justice of the peace is empowered to inflict, such justice shall and may, etc., and proceed to the trial and pass judgment, which shall not extend beyond forty lashes (Rev. Stat. 1836, ch. 111, sec. 41), but may be as much less as shall appear right and proper to the magistrate.

In the defense it is said the words used in the act are too vague and indefinite to give any jurisdiction to any court; that it clothes the magistrate with the power to make and declare the law. To a certain extent it does so, and must do so from the very nature of the case the law was providing against. It was utterly impossible to specify and enumerate all the actions of a slave, as a member of society, which would violate the domestic order of the State, and which, if tolerated, would and must inevitably lead to higher and worse offenses. Without, therefore, making so futile an attempt, it is left to the sound discretion of the justice before whom the offense is brought. And there is humanity in the act. Standing in the relative position which the white man and the slave occupy, there are and must be a great variety of the acts of the latter which cannot and ought not to be suffered, and which could be highly calculated to exasperate. If the law did not provide a remedy in such cases, the consequence would be that individuals would take what they would think

justice into their own hands, and it requires no stretch of imagination to see where such a state of things would end. By the act we are considering, the execution of its provisions is confided to the magistracy of the country, and where could it be more appropriately placed? Scattered throughout the different counties there is scarcely a neighborhood where one or more is not to be found. Justice is speedily and cheaply administered and the peace and good order of society preserved. (377) But it is sufficient for us that since the passage of that act many sessions of the Legislature have been had; it still is the law of the country, and has been repeatedly called into action.

It is further said that there is no act specified in the warrant which amounts to a misdemeanor or offense in a legal sense. The warrant charges that at a late hour of the night Bill was discovered concealed under the bed of Thomas Thompson, with an intent to commit some felony or violence; and upon being so charged, in order to avoid it, he "impudently and insolently" made charges injurious to the character of a young lady living in the house. It is believed that the action of the magistrate is sustainable upon each of the grounds set out in the precept. Is it no violation of the public police of the country, under the definition given by *Justice Blackstone,* for a negro slave to be found secreted under the bed of a white man at a late hour of the night? Is it no offense for a slave "impudently and insolently" to bring charges against a white female injurious to her character? If a white man were to do such an act, and to make such a charge, it would sustain an action for damages. The words "insolently" used in the precept has been criticised. Worcester defines insolently to be anything said or done rudely, and insolent, its root, to be rude, saucy, insulting, abusive, offensive. What acts in a slave towards a white person will amount to insolence it is manifestly impossible to define; it may consist in a look, the pointing of a finger, a refusal or neglect to step out of the way when a white person is seen to approach. But each of such acts violates the rules of propriety, and if tolerated would destroy that subordination upon which our social system rests. They must be restrained, and nowhere can the punishment of such offenses with so much propriety be placed as with the justices of the peace, and much in (378) the enforcement of the law must be left to their sound discretion.

The warrant, then, justified the magistrate in taking cognizance of the charge, and the appeal to the county court was properly taken (act of 1842, ch. J. S. 1), and that court was guilty of no error in refusing a jury trial to Bill. There is nothing in the act granting the appeal which varied the trial in the county court from that before the magistrate, and there is nothing in it authorizing an appeal to the Superior Court. *Hawkins v. Randolph,* 5 N. C., 118; *Atkinson v. Foreman,* 6 N. C., 55;

Wood v. Hood, 4 N. C., 126. In each of these cases the Legislature, by subsequent acts, granted appeals from the county to the Superior Court.

We have thus seen that the acts charged against Bill, if true, subjected him to be dealt with under ch. 111, sec. 41, of Acts of 1836; that the magistrate was justified in his action under it; that the appeal to the county court was properly taken, and that the latter tribunal committed no error in law in refusing him a trial by jury; that the appeal to the Superior Court was improvidently granted, and that his Honor acted properly in dismissing the appeal and refusing the *certiorari*.

PER CURIAM. Affirmed.

Cited: Baker v. Halstead, 44 N. C., 44; *Washington v. Frank*, 46 N. C., 441; *Commissioners v. Kane*, 47 N. C., 291; *Brown v. Keener*, 74 N. C., 721; *S. v. Bennett*, 93 N. C., 504.

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(379)

JOSEPH H. BURNETT v. JOHN THOMPSON.

1. What are the boundaries of a tract of land is a question of law, being a mere question of construction. Where a line is, and what are the facts, must, of course, be found by the jury.
2. There is no law requiring leases for years to be registered, and, therefore, a copy from the register's books is not evidence, as in the case of deeds for freehold estates.
3. A map, which is not shown to have been made before the conveyance under which a party claims, is not evidence for said party.
4. Proof of a deed by one witness is sufficient; and proof of the handwriting of one witness, both being dead, is also sufficient.

APPEAL from *Battle, J.*, at Spring Term, 1852, of BERTIE.

Asa Biggs and W. N. H. Smith for plaintiff.
R. R. Heath, Winston, Jr., Thos. Bragg for defendant.

PEARSON, J. The case turned upon the location of one of the lines of a lease of one Williams by the Tuscarora Indians, dated in 1803, and to continue from the date thereof until 1916. The lease called for the run of Miry Branch; thence down the branch to the run of Town Swamp; thence down the swamp to the swash; thence *down the swash to Coniot Swamp;* thence, etc.

It was argued that the line down the swamp struck the swash at the mouth of the run of the swamp, a point on the south side of the swamp,

and that the next corner was a point at the mouth of Coniot Swamp. The question was, how the line run from the point at the mouth of Town Swamp to the point at the mouth of Coniot Swamp. It was proven that the water from Town Swamp ran, in low water, through the swash in a defined channel and emptied into a place called "Broad (380) Water," and thence into Coniot Creek, some distance from the point at the mouth of Coniot Swamp, and thence down the creek to the river. In high water the swash was all covered, and there was no perceptible run or channel. The swash was a low, boggy tract of country, varying from three-quarters of a mile to a mile in width, and reaching from the mouth of Town Swamp to Coniot Swamp.

Defendant contended that the line run from the point at the mouth of the run of Town Swamp along the channel defined in low water, through the swash, into "Broad Water," and thence to the point at the mouth of Coniot Swamp; and that whether that or the edge of the swash was the boundary was a question for the jury.

Plaintiff contended that from the point at the mouth of Town Swamp the line was *along the edge* of the swash to the point at the mouth of Coniot Swamp.

The court charged that it could not be laid down as a matter of law that in running down the swash the line must be located along the channel defined in low water, through the swash, or along the edge of the swash, and "left it to the jury as a question of fact" to find from the evidence where the line was to be located, telling them it must go down the swash from the point at the mouth of Town Swamp to the point at the mouth of Coniot Swamp. In this there is error.

What are the boundaries of a tract of land is a question of law. It is a mere question of construction. Where a line is and what are the facts must, of course, be found by the jury. In this case two points are agreed on, and the boundary is a direct line from one point to the other, unless there be something to vary it. The Court concurs in the opinion that the channel, defined in low water through the swash, is not the line, because it does not lead to the point. A majority of the (381) Court are inclined to the opinion that the words "down the swash" do, under the circumstances, indicate the direct line, and mean *along or down the edge of the swash*. I confess I incline to a different opinion, because the words "down the swash" are satisfied and correspond with a direct line. But it is not necessary to determine this question, for, take it either way, the plaintiff is entitled to a *venire de novo*, and it is only mentioned in order that, upon the next trial, the attention of the parties may be called to it, so as to have it laid down on the plat in reference to the *locus in quo*. It is assumed that the swash reaches to Coniot Swamp. This depends upon whether "Broad Water" is a

part of the swash. This fact should be distinctly found, as it may affect the opinion of a majority of the Court upon the question of construction.

As the case is to be tried again, it may be well to say that upon the questions of evidence we concur with his Honor. There is no statute requiring leases for years to be registered. Of course, the act of 1846 in regard to registered copies does not apply to them; and it may be well, in this way, to call the attention of the Legislature to the fact, as there seems to be the same reason for requiring leases for years, especially long leases, to be registered as deeds for freehold estates. Until 1819 leases for years were not required to be in writing.

It was proper to reject the maps, as they were not proved to have been made before the lease under which the defendant derived title.

Proof of a deed by one witness is sufficient; and proof of the handwriting of one witness, both being dead, is also sufficient. This is settled.

PER CURIAM. *Venire de novo.*

Cited: Glenn v. Peters, 44 N. C., 458; *Burnett v. Thompson,* 48 N. C., 113; *Burnett v. Thompson,* 52 N. C., 407; *Jones v. Bunker,* 83 N. C., 327; *Davis v. Higgins,* 91 N. C., 386; *Angier v. Howard,* 94 N. C., 29; *Redmond v. Stepp,* 100 N. C., 218; *Brown v. House,* 118 N. C., 877; *Davidson v. Shuler,* 119 N. C., 586; *Rowe v. Lumber Co.,* 128 N. C., 303, 304; *Gates v. McCormick,* 176 N. C., 642.

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(382)

STATE v. GRADDY H. FLOYD.

In a proceeding under the bastardy acts, evidence may be given on the part of the defendant, under the act of 1850-1, that the woman whose examination is offered is unworthy of credit, from her character or from any other cause.

APPEAL from *Ellis, J.,* at Spring Term, 1852, of ROBESON.

Proceeding against the defendant, charging him with being the father of a bastard child; and at his instance an issue was made up in pursuance of the provisions of the statute on the subject.

Upon the trial of the issue at this term the examination of the woman by the justices was offered in evidence, and in reply the defendant proposed to prove that the character of the woman for truth was bad. The evidence was objected to, and rejected by the court, upon the ground that the statute makes the examination of the woman presumptive evi-

dence, at all events, without reference to her character; that its being evidence to that extent did not depend upon her having a good character.

A verdict was returned for the defendant, and from the judgment thereon the State appealed.

Atorney-General for the State.
W. Winslow for defendant.

NASH, J. In my opinion, the court below erred in rejecting (383) the evidence offered by the defendant. A cursory examination of the legislative history on this subject may materially aid in coming to a satisfactory conclusion on the question. The first act on our statute-book was passed in 1741. It is provided there that if a woman, the mother of a bastard child, "shall, upon oath, accuse any man of being the father of her bastard child, etc., such person so accused *shall be adjudged* the reputed father," etc. The uniform exposition under that statute was that the affidavit of the woman was plenary evidence of itself, not only to affiliate the child, but to deprive the man charged of all defense; indeed, no defense was allowed him. The law stood thus until 1814, when the great evil which had sprung up under the former act was endeavored to be removed by giving to the accused a right to have the fact of paternity tried by a jury; but on the trial the Legislature declared that the examination of the woman should be *prima facie* evidence of that fact. Rev. Stat., ch. 12, sec. 4. Under this act *S. v. Patton,* 27 N. C., 180, occurred, and it was decided by the Court that the defendant could only produce evidence to show that he was not the father of the child. The Court also endeavored to draw a distinction between evidence which is *prima facie* and that which is presumptive; and as the *examination* of the woman was made by the act to be the former, they decide that when a woman was, upon the trial, examined as a witness, and it was shown that she had sworn corruptly false, that it would not help the defendant, for set her aside altogether as a witness in the cause, and the examination would still remain, which the statute has declared to be sufficient for his conviction. Such was the opinion of the judge who tried the cause below in that case. This case was followed by others affirming the principle declared by it. Among them is that of *S. v. Wilson,* 32 N. C., 131, in which the Court says that under the act of 1714 the trial claimed by a defendant in a case of bastardy puts in issue the very fact of begetting the child, and (384) nothing more. The defendant might prove nonaccess, impotence, or any other natural defect inconsistent with his paternity, "and were it not for the *peculiar force* given by the statute, according to its *necessary* construction, to the examination of the woman, as evidence to the

jury," etc. This decision took place at August Term, 1849. At the succeeding session of the Legislature, in 1850-51, the law was altered. It was believed that, under the construction put upon the act of 1741 by the Supreme Court, the law was rather too stringent. And the act declares that, for the future, the examination of the woman "shall not be taken as *prima facie* evidence, but shall be regarded as presumptive evidence, subject to be rebutted by other testimony, which may be introduced by the defendant." Whatever of incongruity or of verbiage there may be in the act, there can be no doubt of the meaning of the Legislature. They intended to let in evidence on the part of the defendant, of a circumstantial character, to show he was not the father of the child. Upon that act, he was required to *prove that he was not;* now he is permitted to satisfy the jury, if he can, by any evidence known to the law, that the charge is false. The words of the act are "subject to be rebutted by *other testimony";* by what testimony is left at large. The defendant was therefore at liberty to assail the correctness of the evidence, to wit, the examination, on the part of the State, by any testimony which had a tendency to show the jury that it was not true or that they ought not to rely upon it. And one of the modes of doing that is to prove that the source from which it proceeded was unsound; that the individual testifying to the circumstances relied on was corruptly false in his statement, or that his general character was so infamous that the jury ought not to place any reliance on his statement. The ground upon which his Honor rejected the evidence was that the act makes the examination (385) presumptive evidence at all events, without reference to the character of the woman. So it does; but from an abundance of caution it goes on to say it (the examination) may be rebutted by other evidence. What may be rebutted? Not the fact of the examination, but the truth of the facts stated in it. Without those latter words in the act, I should have held that after the Legislature had made the examination presumptive evidence—like all evidence of a similar character—it was open to the other party to rebut or repel. The act of 1850 has been subjected to much criticism, I think unjustly. It has been said that *prima facie* evidence may be rebutted by other testimony, and that presumptive evidence may also be so met. This is true. The only objection that I see is that the latter words of the act are unnecessary. In *S. v. Patton, supra,* it had been declared by the Court that there was a difference between the two characters of evidence; that *prima facie* evidence is such evidence as, in judgment of law, is sufficient to establish the fact in controversy, and, in the absence of controlling testimony, becomes conclusive, and the jury, by the law, are bound so to consider it; and that presumptive evidence, properly so called, is that which does not of itself directly prove the controverted fact, but leaves the jury at liberty

to find in accordance with it or not, as their minds shall direct. For this distinction reference was made to 1 Phil. Ev., 155-56, and to the cases of ———— *v. Jackson,* 4 Peters, 1, and *Kelly v. Jackson,* 6 Peters, 632.

I recognize no higher authority in matters of law than that of this Court and of the Supreme Court of the United States. I hold, therefore, that there is a plain and manifest difference between evidence which is *prima facie* and that which is called presumptive. The effect of the one is a conclusion of law; the effect of the other, the result of the reasoning of the jury.

Presumptions of law are, by Mr. Best in his treatise on pre- (386) sumptions of law, among other divisions, divided into absolute and conclusive, or conditional and inconclusive. The former, by common-law writers, are called irrebuttable presumptions, and by civilians *presumptiones juris et de jure;* and the latter rebuttable, and *presumptiones juris.* Of the first kind is the presumption of a grant from thirty years quiet possession under it. The law will not allow of testimony to show the reverse. So an infant under seven years of age is presumed to be incapable of committing a felony—nor will it be permitted to show the contrary by the clearest evidence. 4 Bl: Com., 23; 1 Phil. on Ev., 462.

Rebuttable presumptions of law are intendments of law, and only hold until disproved. Thus, though the law presumes every infant between seven and fourteen to be *doli incapax,* still a mischievous disposition may be shown. 4 Bl. Com., 23. Such a presumption is sometimes called *prima facie* evidence. Best, 43. A receipt for rent is *prima facie* evidence that all rent due previously thereto has been paid. *Prima facie* evidence is a rebuttable presumption of law, and if not rebutted, the jury is bound in law to find their verdict in accordance with it, and if they refuse so to do, they violate their duty; but under evidence strictly presumptive, they may or may not find with it, as their judgment may dictate. Whatever doubt might exist as to the distinction attempted to be drawn, as above, is put to rest by the act itself. The examination of the woman is declared to be presumptive evidence, subject to be rebutted by other testimony to be introduced by the defendant. The object of the evidence rejected was pertinent to the issue, as enabling the jury to say how far they could depend upon the person who made it. Rules of evidence are but rules of law, subject to be altered by the Legislature when and how they please, so they do not infringe upon rights already vested in individuals.

In my opinion, there is error in the ruling of the judge below, and there ought to be a *venire de novo.*

(387) RUFFIN, C. J. Perhaps the terms *"prima facie"* and "presumptive" evidence may not be used with perfect accuracy in the act of 1850, ch. 15. But some reasonable meaning must be given to them, and such as will carry out the legislative intention, if it can be discovered. It is not necessary, for that purpose, to enter into a critical disquisition as to their precise signification and difference, because, as found in the act, they are obviously used in contradistinction. Keeping that circumstance in mind, and having regard to the construction given to the expression *"prima facie* evidence" in the act of 1814, and also to the fact that it had been held that the woman, when offered as a witness on the trial of an issue, might be discredited and impeached, though her examination could only be disproved, it would seem sufficiently clear that, as evidence, the act meant to put the examination before the justices on the same footing with the testimony of the woman in person. Therefore, it was competent for the defendant to offer any evidence calculated to impair confidence in the examination as the oath of the particular woman.

It seems probable that, in practice, the act will not prove salutary, but will defeat the whole policy of the bastardy laws. But that is for legislative and not judicial consideration and correction; and it should not be allowed to affect the construction of the act, so as to prevent a fair one being put on it, in conformity with the purpose of the Legislature.

The judgment must be reversed, and a *venire de novo* awarded.

PEARSON, J., dissenting.

PER CURIAM. *Venire de novo.*

Cited: S. v. Pate, 44 N. C., 245; *S. v. Britt,* 78 N. C., 441.

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(388)

THOMAS R. GIBBS v. JOHN BERRY.

1. There is no statutory provision in this State upon the subject of awards; but it is the practice to enter up judgments upon them, in those cases where, by the common law, an attachment would have been granted for a disobedience of a rule of court, that is, where the rule has been made by the court in a cause pending therein.

2. An award must be certain, and this certainty must appear upon the face of the award. The award must also be final, as to all the matters submitted, so as to put an end to the suit.

3. But where, in addition to the general rule for arbitration, it was entered of record that "It is further ordered, by consent of the parties, that the said referees inquire and ascertain the dividing line of the lands of the said parties, and that they lay off and establish the lines which they shall ascertain, etc., and cause a correct plat to be made, etc.; and that the said parties, upon said dividing line being so established, make and execute such releases to each other that may be necessary and proper," and the referees made a report according to this submission, *it was held* that the court should not set aside this report, but leave it to the parties to assert their claims in a court of equity, as upon a contract.

APPEAL from *Settle, J.*, at Spring Term, 1852, of HYDE.

Trespass quare clausum fregit. Upon the return of the writ in the county court, where it pended, the cause was, by consent of the parties, referred to arbitrators, "and their award to be a rule of the court." The order then proceeds: "It is further ordered, by consent of parties, that the said referees inquire and ascertain the dividing line of the lands of the said parties, and that they lay off and establish the lines which they shall ascertain, etc., and cause a correct plat to be made, etc.; and that the said parties, upon said dividing line being so established, make and execute such releases to each other that may be necessary and proper." The arbitrators made their award, by which they ascertained the dividing line between the parties, had it marked, and returned (389) a survey and plat to the court. Upon the return of the arbitrators, a motion was made on the part of the defendant for judgment according to the award. This was opposed by the plaintiff on various grounds. *First,* because the award does not conform to the terms of the submission; *second,* that it is void for uncertainty; *third,* because the arbitrators have not awarded any judgment in the case submitted. Other objections were made, which are not stated, as not entering into the decision of the Superior Court. In the county court the exceptions to the award were overruled, and judgment awarded, from which an appeal was taken to the Superior Court, and the exceptions above stated were sustained and the award set aside, and an appeal granted to the Supreme Court.

[*Copy of Award.*]

STATE OF NORTH CAROLINA—Hyde County.

Pursuant of and in obedience to an order of the worshipful the Court of Pleas and Quarter Sessions of the county of Hyde, at its session, May Term, 1851, made in the case of *Thomas R. Gibbs v. John Berry, Jr.*, we, R. M. G. Moore and Samuel Topping, having met on the premises and, after examining title papers and hearing testimony, have proceeded to establish the lines of the land of and between the said Gibbs and

Berry, which lands, lying and being in the county of Hyde, and lying between Mattamuskeet Lake and Juniper Bay, and on the east side of and adjoining Juniper Bay road, and being in a patent patented by Abram Jones and John Eborn, a survey of said lands we have caused to be made, agreeable to the surveyor's plat hereunto annexed, and we have laid out and established the lines of the lands between the said Thomas R. Gibbs and John Berry, Jr., to be as follows, viz.: Beginning on the side of Juniper Bay road, at a stake or post standing 11 feet from the edge of and on the south side of a ditch, known as the hotel
(390) ditch, running from thence S. 78° E. 165 poles to the back line of Jones and Eborn's patent; thence with the patent line S. 10° W. 152 poles to the patent corner, which said lines, we say, confirm, and establish as the true lines of land between said Gibbs and Berry, agreeable to the plat of survey, will show.

In confirmation whereof, we, the said R. M. G. Moore and Samuel Topping, have hereunto set our hands and seals, this 5 August, 1851; and we also further say that each party shall pay his own costs.

This 26 August, 1851.

R. M. G. MOORE. [SEAL.]

Witness: JAMES F. LATHAM. SAMUEL TOPPING. [SEAL.]

Donnell and Rodman for plaintiff.
W. H. Haywood for defendant.

NASH, J. There is in this State no statutory provision on the subject of awards. It has been the practice, however, to enter up judgments upon them in those cases where, by the common law, an attachment would have been granted for disobedience of a rule of court, that is, where the rule has been made by the court in a cause pending therein. The writ in this case was returned and the rule regularly made. The first inquiry is, What was submitted to the arbitrators? The action was for trespass to land alleged to be in the possession of the plaintiff, and for which he claimed damages of the defendant. The order is "that it be referred to R. M. G. Moore and Samuel Topping, etc., and their award to be a rule of court." The arbitrators are judges selected by the parties; and act in the place of judge and jury, and it is their duty to make such a return as will enable the court to enter up a judgment between the parties. To have this effect it must be certain, for the very end and object of the parties is to put an end to the litigation; for if uncertain, it would be a fresh source of litigation, and this uncertainty must appear upon the face of the award, for the court will not intend it.

It must also be final, that is, be a final disposition of all the matters in dispute, and which are within the submission. In both these particulars the award is defective.

It is not final, for it does not put an end to the suit. It awards (391) nothing to be done by either of the parties; awards no damages to the plaintiff for the trespass, nor does it find that any trespass was or was not in fact committed by the defendant on any land of the plaintiff. Nor, for the above reasons, is it certain to a common intent. No judgment can, therefore, be pronounced upon it by the Court.

His Honor committed no error in refusing to give judgment upon the award. But he erred in setting it aside. That portion of the record in which the referees are required to run and mark the dividing line between the parties is no part of the rule in reference to the suit then pending; and although they have caused such line to be run, and had it marked, the Court can pronounce no judgment. A court of law awards damages for the breach of a contract; it cannot cause it to be specially performed. That portion of the record shows an agreement between the parties that such a line should be run by the arbitrators and marked; and upon its being done, they would execute releases. Being an agreement, each party has an interest in it, and through the medium of a court of equity can enforce a performance of it, or the one refusing compliance can, in a proper action at law, be made to compensate the other in damages. An award may be good in part and bad in part.

The judgment of the court setting aside the award is reversed and the cause remanded, with directions to proceed with the trial of the suit.

PER CURIAM. Reversed and remanded.

Cited: Harralson v. Pleasants, 61 N. C., 366; *Millinery Co. v. Ins. Co.,* 160 N. C., 139.

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(392)

WILLIAM HERRING v. JOHN TILGHMAN ET AL.

1. A., having possession of a note payable to one B., and not endorsed, and claiming the property therein, placed it for collection in the hands of C., who converted the proceeds to his own use: *Held,* that A. could not support an action of trover against C. either for the note or the proceeds, because he had not the legal title to either.

2. To maintain trover, the plaintiff must show title, or a right of possession, the owner being unknown.

APPEAL from *Settle, J.*, at Spring Term, 1852, of LENOIR.

Trover, brought against the intestate of the defendant, in his lifetime, for the conversion of a note for $200 against one Jonathan Rouse, claimed as the property of the plaintiff. The plaintiff declared, *first*, upon a conversion of the note; *second*, upon a conversion of the proceeds of the note, the same having been collected from Jonathan Rouse by the defendant's intestate and converted to his own use. *Pleas*, general issue and statute of limitations. Upon the trial the plaintiff introduced one Abram Congleton to prove that he, the plaintiff, placed in the hands of the said witness, who was at that time a constable in the county of Lenoir, for collection, a note or bond payable to one William D. Mosely against Jonathan Rouse for $200, which note had not been endorsed by the payee, but the plaintiff claimed it as his property; and also to prove that the said witness pledged the said note, with another, for the sum of $100, to defendant's intestate, who collected the same from Jonathan Rouse and appropriated the proceeds to his own use. Defendant (393) objected to the competency of this witness, on the ground of his direct interest in the event of the suit, for that the said witness was himself liable to the plaintiff, having sold the note in controversy to defendant's intestate, and would be exonerated therefrom by the recovery of the plaintiff against the defendant in this case. The witness was not released by the plaintiff. The court rejected the witness, holding that he was interested in the event of the suit, and therefore incompetent. Thereupon plaintiff submitted to a nonsuit and appealed.

J. W. Bryan and J. H. Bryan for plaintiff.
W. H. Haywood for defendant.

PEARSON, J. It is unnecessary to decide the question of evidence raised by plaintiff's exception, because, supposing him entitled to the evidence, the action cannot be sustained. The first count, for the conversion of the note, cannot be sustained, because, by plaintiff's own showing, he is not the owner of it; the legal title being in Mosely, and he alone is recognized as the owner in a court of law, and the plaintiff is considered as a mere agent authorized to receive the money and to bring the suit in the name of Mosely. The property in a note payable to A., or to A. or order, can only be transferred at law by endorsement. *Fairly v. McLean*, 33 N. C., 158.

The second count, for the conversion of the proceeds of the note, viz., the money collected by the defendant, cannot be sustained, because the plaintiff is not the owner of the money, and has no more right of prop-

erty in it than in any other parcel of money of the same amount. He never had it in possession, and it was not collected for him. To maintain trover the plaintiff must show title, or a right of possession, the owner being unknown. *Barwick v. Barwick,* 33 N. C., 80.

In many cases, when one converts the property of another and (394) receives the money for it, the party is allowed to waive the *"tort"* and bring an action for "money had and received," treating the defendant as his agent and placing the transaction on the ground of contract. This is called an "equitable action," and has been carried very far to meet what is supposed to be the justice of the case. Possibly, by a stretch of the doctrine, the plaintiff could maintain an action for "money had and received," treating the defendant as the agent of the constable, who was plaintiff's agent. It would, however, require very strong authority to induce this Court so to extend the doctrine, in face of the fact that the defendant was acting for himself as a purchaser. The idea that trover, which is an action *ex delicto,* can be maintained for the money collected by the defendant, not only violates all principle, but receives no countenance from any authority or intimation to be met with in the books.

PER CURIAM. Affirmed.

Cited: Springs v. Cole, 171 N. C., 419.

JOHN C. HETFIELD v. ABRAHAM BAUM.

1. A person who purchases goods at a wreck sale has a right to take off his goods by the most convenient route, though, in doing so, he has to pass over the land of another, who has forbidden him to enter on or to cross his land for that purpose.

2. In such a case, though the land has been granted by the State, a right of way is reserved, from necessity.

APPEAL from *Battle, J.,* at Spring Term, 1852, of CURRITUCK. (395) *Trespass quare clausum fregit,* to which the defendant pleaded the general issue and license. Upon the trial it appeared that the alleged trespass was committed upon a tract of land to which the plaintiff showed title, and of which he was then in possession. The defendant then showed that a brig, called the *Justitia,* was wrecked upon the said land, and a sale of her cargo was regularly advertised by the wreck master for the district, and that he and many other persons attended the sale, which was on the said land, and that he bought some of the articles

at the said sale and carted them, together with articles purchased by other persons, across plaintiff's said land, along the most convenient route to the nearest point where they could be put on boats on Currituck Sound, and the said route was mostly over a barren sand-bank and a small portion of marsh, all unenclosed. It appeared in testimony that property thus purchased on the said beach could be taken off by means of the sea, but with much inconvenience and risk, and that it might be carried along the beach at great inconvenience, and that the shortest and most convenient route by which the defendant could carry off the articles so purchased was across plaintiff's land to Currituck Sound. It appeared further that plaintiff and defendant had a dispute during the sale, whereupon the plaintiff forbade the defendant from carting across his land; but the defendant did afterwards cross the said land with his carts, as before stated.

Defendant's counsel contended that as wreck sales were made under the authority of the law, every person had a right to attend them, and to carry off such articles as he might purchase by the most convenient route across the lands of the adjacent proprietors, even though they should forbid it.

(396) The court instructed the jury that, upon the facts proved, the plaintiff was entitled to recover at least nominal damages. The jury found a verdict for nominal damages, and from the judgment thereon the defendant appealed.

Ehringhaus for plaintiff.
Jordan and Smith for defendant.

PEARSON, J. The sovereign has a right to wrecks and all property stranded on the sea beach, and in many countries this right is exercised so as to be a source of considerable revenue.

North Carolina has a sea-coast great in extent and very dangerous, and there are probably more wrecks upon her coast during the year than upon that of any five of the other states. She has, from a very early period, adopted a humane, liberal, and enlightened policy in reference to wrecks, and may well challenge a comparison of her policy with that of any other nation on earth.

The whole extent of her sea-coast is laid off into "wreck districts" of convenient size. It is made the duty of the courts of pleas and quarter sessions of the several counties in which such districts are situated to appoint a "commissioner of wrecks" in each district, who shall reside in the district and enter into bond with good security in the penalty of $15,000 for the proper discharge of his duties. It is made his duty, "on

the earliest intelligence" of any vessel being in danger of being stranded, or being stranded, to command the sheriff or any constable of the county to summon as many men as shall be thought necessary to the assistance of such vessel. If the vessel is stranded, it is made his duty to see that the goods are collected and taken care of; should the captain or owner desire it, he is at liberty to reship the goods; if they are lost or broken, it is his duty, after advertisement, to sell the goods at (397) public auction, to make a full return of the sales to the next court, and to pay into court the amount of sales, which fund is to be held for the owner or insurer. But if, after *due advertisement,* and after the expiration of one year and one day, no person applies for the fund, it is to be transmitted to the Public Treasurer of the State, for the use of the State. And the statute makes it a felony to embezzle or steal any stranded property, or to conceal the same knowing it to have been stolen. Rev. Stat., ch. 123, title "Wrecks."

"The banks" is a narrow strip of land, mostly sand banks, from which the name is derived, interposed between the ocean and the sounds, and in the locality concerned in the case before us extending from the Virginia line to Ocracoke Inlet, without a single harbor; so that neither vessels nor boats can "live" in the ocean, and boats are only preserved by hauling them up on the banks; consequently, it is impossible for the commissioner of wrecks to go with his men to the assistance of a vessel in distress or to collect and take care of wrecked or stranded property, or to expose the same to public auction, unless there be a *right of way over the banks,* and a right of ingress, egress, and regress, as often as may be necessary to preserve, take and carry away such property as may be exposed to public auction in pursuance of the laws of the State.

The question is, Where a grant issues for the land on the banks, is there a reservation of this right of way by necessity or by necessary implication? Does the State, by a grant of the land, deprive herself of the ability to carry into effect the provisions of this humane and noble statute, by which she has undertaken to assist the unfortunate and to take care of and hold wrecked and stranded property as a "trustee" for the owner or insurer?

A public statute cannot thus be abrogated by a grant of land, (398) and there is, by necessary implication, a reservation of the right of way, or, in other words, the right of way exists of necessity. If one is shipwrecked he has, of necessity, a right of way to go on "the banks," and of egress and regress, as often as may be necessary to take away his property, doing no unnecessary damage.

Baron Comyns, in his digest, informs us that a right of private way may be acquired by prescription, by grant, or *"for necessity";* and among

other instances he puts this: "So, if a man has title to a wreck, he has a right to have a way over the land of another, where the wreck lies, to take it, *of necessity.*" 3 Comyns Digest, 39, title "Private Way."

In 6 Modern Cases, 212, it is said: "Originally, all wrecks were in the crown, and the king has a right of way over any man's ground for his wreck; and the same privilege goes to a grantee thereof."

Lord Holt says: "He who gives up the way of coming at a thing gives up the thing itself."

Plaintiff does not insist that, by a grant of the land, he acquired a right to all wrecked or stranded property; and yet, if this action is sustained, he will, in effect, be the owner and have a franchise and "peculiar privilege" to take all such property as may be wrecked or stranded upon *"his banks";* for he has only to say, "No one, except by my permission, has a right to cross over the bank," and thus all of the property becomes his at his *own bid.* Such a state of things is not and ought not to be tolerated.

It is said a right to fish or to bathe in the ocean is a public right, and belongs to every one, and yet there is no right of way reserved, or "existing of necessity," by which every person has a right, in order to fish or bathe, to pass over land adjacent to the beach belonging to a third person. For this are cited *Blondel v. Caterel,* 5 Bar. & Al., 51; *Ball v. Herbert,* 3 Term, 253.

(399) We concur in the principles of the cases cited, but there is an obvious distinction. Here there is a right in the sovereign, to the exercise of which the right of way is necessary, as occasion may require; therefore it is implied or exists of necessity. There the right of fishing or of bathing belongs to every one; it is not a right of the sovereign, but belongs to every one. We all, by nature, have a right to see by the light of the sun, and to breathe the air of heaven, to bathe in the sea, and to catch fish; but there is no necessity and nothing from which to imply a right to go over another's land for these purposes. There is this further and very obvious ground of distinction: A right of way for the purpose of assisting a vessel in distress, or of collecting, taking care of, and selling property wrecked or stranded, is consistent with a grant of the land, because the right only exists as *occasion may call for it;* whereas, if *every person* has a right of way over land adjacent to the ocean, *at all times* and *at all places,* such an unlimited right is inconsistent with a grant of the land, and it does not exist "of necessity."

PER CURIAM. *Venire de novo.*

Dist.: Caroon v. Doxey, 48 N. C., 24.

(400)

DEN ON DEMISE OF SUSAN E. BECKWITH v. CORNELIUS G. LAMB.

A certificate of probate on the deed of a *feme covert* set forth that the deed "was exhibited in open court and the execution thereof by (the husband) was proved by" (T. S., a subscribing witness) "and acknowledged by" (the *feme covert*); "when, on motion in open court" (L. S., Esq.), one of "the presiding justices, was appointed to take the private examination of" (the said *feme covert*) "as to her consent in signing the said deed; who reported she acknowledged to have signed it of her own free will and accord, without any compulsion from her said husband. Ordered to be recorded": *Held*, that the probate was sufficient to make the deed valid against the wife.

APPEAL from *Settle, J.*, at Fall Term, 1851, of PASQUOTANK.

Ejectment, submitted on the following case agreed: The *feme* lessor, Susan E. Beckwith, while the wife of Watrous Beckwith, now deceased, signed a deed in due form of law to convey her interest in the premises, which she owned in fee, prior to her coverture. The probate, examination, and report on the said deed are as follows, viz.:

February Probate Court, 1827.

NORTH CAROLINA—Pasquotank County.

This deed of bargain and sale from Watrous Beckwith and wife, Susan E., and William Shaw and Edmund Blunt, to John M. Skinner, with a release thereon from said John M. Skinner to the said Watrous and Susan E. for the burying ground, was exhibited in open court, and the execution thereof by the said Watrous, William, Edmund, and John was proved by the oath of Thomas L. Shannonhouse, one (401) of the subscribing witnesses thereto, and acknowledged by Susan E.; and on motion in open court, Lemuel Jennings, Esq., one of the presiding justices, was appointed to take the private examination of the said Susan E., as to her consent in signing said deed, who reported she acknowledged to have signed it of her own free will and accord, without any compulsion from her said husband. Ordered to be recorded.

The presiding judge being of opinion that the probate, examination, report, and registration were not good and sufficient and available to pass title to a *feme covert's* lands, directed a judgment in favor of the plaintiff, which was entered, and from which the defendant appealed.

Jordan, R. R. Heath, and W. N. H. Smith for plaintiff.
B. F. Moore, Ehringhaus, and W. H. Haywood for defendant.

PEARSON, J. The lessor of the plaintiff, while a *feme covert*, had executed two deeds; and it was agreed that if the "probate, examination,

report, and registration" on either of them was sufficient in law, judgment was to be entered for the defendant. But if the probate, etc., on neither was sufficient, then judgment was to be entered for the plaintiff. His Honor was of the latter opinion, and directed a judgment in favor of the plaintiff.

In this opinion we do not concur. In reference to the first deed, the record of the county court sets forth that it was exhibited in open court, and the execution thereof by the husband was proved by the oath of one of the subscribing witnesses, and it was acknowledged by the wife; "when on motion in open court, Lemuel Jennings, Esq., one of the presiding justices, was appointed to take the private examination of the said Susan E. (the wife) as to her consent in signing said deed, who reported she acknowledged to have signed it of her own free will and accord, without any compulsion from her said husband. Ordered to be recorded."

(402) The objection is that it is not set forth that upon her *private* examination she acknowledged, etc. All that is set forth in this record occurred at the same time. *Joyner v. Faulcon*, 37 N. C., 386; *Etheridge v. Ferebee*, 31 N. C., 312. A member of the court is appointed to take the private examination, according to the course of the court; this is done in its "verge," that is, in its presence and view; he reports that she acknowledged, etc. The fact that this acknowledgment was made upon the private examination which he was appointed to take is set forth not merely with "certainty to a common intent," but with "certainty to a certain intent"; and we hold that it is not necessary that it should be set forth with "certainty to a certain intent" in every particular, so as to *exclude any inference to the contrary* which might, by possibility be imagined. This extreme degree of certainty is not now required in criminal pleadings, and specimens of it are only to be found in certain special pleas, which are not favored by the courts. But if there was occasion for it, the inference is irresistible that the acknowledgment was made upon the private examination which a member of the court had been appointed to take. He acted in its presence, reports the acknowledgment, and the *court acts upon it* and orders the deed to be registered. This inference is irresistible, unless we adopt the conclusion that the county courts are wholly unfit for the business which, by law, is confided to them. In *Etheridge v. Ferebee*, cited above, it is decided that if two justices of the peace report to the court that they have taken the private examination, and the court receives the report and *acts upon it*, it will be inferred that the two justices were members of the court and had been appointed for that purpose. This case is the converse of that, and is fully sustained by it, as the rule must work both ways.

Here the appointment, and the fact of the justice being a mem- (403) ber of the court, are set forth, and we infer the private examination, and there the private examination is set forth, and we infer the appointment and the fact of the justice being a member of the court; and as in that case, so in this, there is a circumstance that it is not necessary to call in aid of our conclusion, viz., the deed was proven as to the husband by a subscribing witness, which tends to negative the fact of his being present.

The fact that the deed was proven as to the husband, instead of being *acknowledged both* by him and his wife, was not relied on in the argument; but it may be well to advert to it, as at one time there was an impression that the objection was fatal. All doubt upon this, however, is settled in *Joyner v. Faulcon*, cited above, and in *Etheridge v. Ashbee*, 31 N. C., 353. The point is not made, although the deed there was proven by a witness as to the husband, who did not acknowledge it, as is announced in the last case. This Court has "every disposition by fair construction to sustain the deeds of *feme coverts*"—and does not feel it to be a duty to become astute in detecting informalities and irregularities whereby to avoid such deeds and throw the loss on innocent purchasers.

It is not necessary to notice the questions made as to the second deed upon the agreement of the parties.

Judgment reversed and judgment in favor of defendant.

PER CURIAM. Judgment accordingly.

Cited: Marshall v. Fisher, 46 N. C., 115; *Freeman v. Hatley*, 48 N. C., 119; *Barwick v. Wood, ibid*, 311; *Leatherwood v. Boyd*, 60 N. C., 124; *Robbins v. Harris* 96 N. C., 559; *Sellers v. Sellers*, 98 N. C., 18; *Kidd v. Venable*, 111 N. C., 538; *Reynolds v. Cotton Mills*, 177 N. C., 424; *Frisbee v. Cole*, 179 N. C., 474.

(404)

JOHN BAILEY v. JOSEPH H. POOLE.

1. The general rule is that a witness must speak to facts, and cannot give his opinion as derived from these facts. The only exceptions are as to questions of science and of sanity.

2. It is the duty of a judge, when he does charge upon evidence, to collate it and bring it together in one view, on each side, with such remarks and illustrations as may properly direct the attention of the jury. It is also his duty to bring to the notice of the jury principles of law or facts which have an important bearing upon the case, though omitted in the argument of counsel.

APPEAL from *Battle, J.*, at Spring Term, 1852, of PASQUOTANK.

Trespass on the case, in which the plaintiff declared against the defendant for misrepresenting the title of the plaintiff to certain real estates, upon an execution sale of the same, whereby it sold at a great sacrifice, to the plaintiff's damage.

Upon the trial the plaintiff, after showing that he was the owner of certain lots in the town of Nixonton, and that certain creditors of his had obtained judgments against him and taken out executions therein and delivered them to the sheriff, proved that the sheriff levied upon the said town lots and lands and offered them for sale; that the defendant was present and bid $1 for the lots.

Whereupon one Pritchard, who testified to those facts, bid $5, and the defendant then bid a small sum above that, and Pritchard made another bid of $10, when the defendant remarked to him that he, the defendant, had a trust on the property in favor of his father's estate for more than it was worth, and that he was bidding only for the purpose of getting possession, and then bid 50 cents more, and it was knocked down to him, Pritchard declining to bid any further, in conse-
(405) quence of such representations. Pritchard stated further that the plaintiff was standing very near him at the time when the defendant made the representation above mentioned, and, as it was made, pressed his arm. Plaintiff's counsel asked the witness what was his impression as to the meaning of the plaintiff by pressing his (witness's) arm. The question was objected to by defendant's counsel and ruled out by the court. Plaintiff's counsel, by the permission of the court, asked the witness whether he desisted from bidding in consequence of the pressure of his arm by the plaintiff, but before the witness answered it the counsel withdrew it. Much other testimony was given on both sides, which it is necessary to give, as the only questions raised on the motion for a new trial are presented in the foregoing statement.

Defendant's counsel contended that his remark at the sale had been misunderstood by the witness, but if it were taken to be true, it, in connection with other circumstances, showed that plaintiff and defendant had an understanding with each other that the defendant should purchase the property at an under-value and, afterwards, upon a resale, give the plaintiff the benefit of the advanced price, and that if such were the case, the plaintiff could not recover.

Counsel further contended that the plaintiff had failed to show that any person was willing to give more for the property at the execution sale than was bid by the defendant. But the counsel did not, in their argument to the jury, remark upon the withdrawal by plaintiff's counsel of the question put to the witness Pritchard, as above stated. The court charged the jury that if the plaintiff had agreed with the defend-

ant that the latter should, by making a misrepresentation of his (406) title, purchase the land at an under-value for plaintiff's benefit, he could not recover. The court then called the attention of the jury to the different circumstances relied upon by the defendant, among which was the pressing of the witness Pritchard's arm, and remarked that they might consider it in connection with the question put and withdrawn by plaintiff's counsel.

The jury returned a verdict for the defendant, whereupon plaintiff's counsel moved for a new trial because the court had rejected the testimony of the witness Pritchard's impression as to the meaning of the plaintiff in pressing his arm, and also because the court had stated to the jury that they might take into consideration the fact that plaintiff's counsel had asked and then withdrawn the question whether the said witness had desisted from bidding in consequence of the pressure of his arm by the plaintiff, when defendant's counsel had omitted to remark upon it. The motion was overruled, and a judgment given, from which plaintiff appealed.

B. F. Moore for plaintiff.
R. R. Heath, Ehringhaus, Jordan, and W. N. H. Smith for defendant.

NASH, J. We do not perceive any error committed by his Honor in the court below, either in rejecting the testimony of the impressions of the witness Pritchard or in calling the attention of the jury to the question put by plaintiff's counsel and then withdrawn by him.

As to the first point, it admits of no controversy. The general rule is that a witness must speak to facts, and opinion, as evidence, is pretty much confined to questions of science, art, or skill in some particular branch of trade, and to cases of sanity and the like. These are excepted cases, and in no instance that I know of has such an opinion as required in this case been permitted. The witness was requested to state his impression from an act of the intention of another person in that act. It was nothing but an opinion.

Plaintiff's attorney, by the permission of the court, asked the (407) witness Pritchard whether he desisted from bidding in consequence of the pressure of his arm by the plaintiff, but withdrew the question before it was answered. In order to answer properly the second exception, it is necessary to look at the point in issue between the parties. The defense to the action was that plaintiff and defendant were acting in concert at the sale, upon an agreement that the defendant should purchase the property at a small price, so that upon a resale there might be a surplus for the benefit of the plaintiff. The case states that, in commenting upon the defense, his Honor called the attention of the

jury to the different circumstances relied upon in the defense, among which was the pressure of Pritchard's arm, "that they might, in connection with it, consider the question put and withdrawn by plaintiff's counsel." In this there was no error; it was a fact transpiring in the course of the trial, brought before the jury by one of the parties and in relation to the question under investigation. The jury surely were at liberty, in weighing the testimony, to take it into their consideration; and if they could legally do so, the court in charging them had a right to direct their attention to it. We do not consider a judge, under the act of 1794, in delivering his charge on the facts of a case, to be a mere machine to detail to the jury the evidence just as it occurred, and in the order it occurred; but it is his duty, when he does charge upon it, to collate it and bring it together in one view, on each side, with such remarks and illustrations as may properly direct their attention. Nor is it any error in a judge or any officiousness to bring to the notice of the jury principles of law or facts bearing upon the case which counsel may have omitted in argument. If important to the decision of the case, it is his duty to do so. What effect the fact would have (408) upon the mind of the jury in this case was for them to decide; *per se* it stood in direct connection with the question previously asked, and answered either way might have had an important bearing upon the decision. We see no error in the charge. *S. v. Moses*, 13 N. C., 452.

PER CURIAM. No error.

Cited: S. v. Caldwell, 44 N. C., 249; *S. v. White*, 50 N. C., 229; *S. v. Williams*, 68 N. C., 61; *S. v. Gregory, ibid.* 317; *S. v. Garrett, ibid,* 360; *Aston v. Craigmiles*, 70 N. C., 318; *Isler v. Dewey*, 75 N. C., 467; *Burton v. R. R.*, 84 N. C., 200; *Boing v. R. R.*, 87 N. C., 362; *S. v. Gilmer*, 97 N. C., 429; *Burwell v. Sneed*, 104 N. C., 120; *S. v. Boyle, ibid,* 820; *S. v. Melton*, 120 N. C., 597.

DEN ON DEMISE OF H. G. SPRUILL v. J. LEARY ET AL.

[See *ante*, p. 225.]

PEARSON, J., dissenting: William Jones had an estate to him and his heirs in possession, with an executory devise over to his brothers if he died without leaving a child living at his death. In 1825 he conveyed

NOTE. Judge PEARSON was under the impression that this case would not have been reported at December Term, 1851. His dissenting opinion, therefore, was not filed till the present term.—REPORTER.

by deed of bargain and sale to Blount in fee, with general warranty, and in 1849 died without issue. Are his brothers barred by the warranty? The Statute of Anne provides that all warranties made by a tenant for life shall be void, and all collateral warranties shall be void, except those made by one having an estate of inheritance in (409) possession. This case comes within the words of the exception, and is not embraced in the enacting clause. So *it is agreed* that, while on the one hand it is not aided, on the other it is not prejudiced thereby; and unless the warranty was a bar at common law, the statute cannot have the effect of making it so. A collateral warranty barred the heir without assets. This was the general rule. It was modified and its hardship mitigated to some extent by the doctrine of warranty commencing by disseizin. But this doctrine was very limited in its application, for, if the warrantor had any estate of freehold there could not be a disseizin, or if he committed a disseizin and afterwards conveyed with warranty, the warranty did not *commence* by disseizin; it was necessary that the disseizin and the warranty should be *"simul et semel."* Coke Lit., 367a. The injustice of this rule was seen at a very early period, and to restrain its operation the Statute of Gloucester, 6 Ed. I., provides that the warranty of a tenant by the curtesy shall not bar without assets. It was followed by the Statute of 11 Hen. VII., putting a like restraint upon the warranty of a tenant in dower. And the obvious intent of the more general Statute of Anne was to carry out this policy; hence, a construction by which the operation of the rule, instead of being restrained, is extended to a case which was not before included, would manifestly be doing violence to the plain meaning of that statute. For instance, if one commit a disseizin, he has an estate of inheritance in possession, and should he afterwards make a feoffment with warranty, the case would be within the words of the exception, notwithstanding the disseizin was committed with an intent to make the warranty. Such a warranty was not a bar at common law. Does the statute make it one? So if a husband makes a feoffment in fee to the brother of his wife, and the brother makes feoffment with warranty, and dies without issue, whereby the warranty falls on the wife, as his heir, and then the husband dies, the wife was not barred of dower at common law. Coke (410) Lit., 389a; *Vernon's case,* 4 Rep. Shall she be barred by force of an exception because the brother had an estate of inheritance in possession? *"Qui hæret in litera, hæret in cortice."* Again, one makes feoffment in fee to his brother upon condition; the condition is broken; at common law the feoffor was not barred by the warranty, which fell upon him as the heir of the warrantor. *Seymour's case,* 10 Rep. Do the words of the exception *create* a bar? It is not necessary to multiply instances, because in the opinion delivered by the Chief Justice the con-

clusion to which he arrives is put on the ground that, in the case under consideration, the warranty was a bar at common law. He seeks no aid from the statute, and regrets that the Legislature have not seen fit to alter an artificial and hard rule. So the only question is, Was the warranty a bar at common law? This suggestion is proper at the outset. The rule, if it existed, in reference to a fee limited upon a fee by conditional limitation and executory devise, is admitted to be an artificial and hard one; of course, its existence ought to be clearly established. And, if it be suggested that the words of the exception are declaratory, and tend, in some measure, to prove the existence of the rule, the reply is, the words are satisfied by applying them to the case of tenant in tail in possession, with remainder or reversion, in which cases there can be no question that the warranty of the tenant in tail did, at common law, bar without assets the remainderman or reversioner, if he happened to be the heir. Such remainders and reversions were esteemed of but little value, and were never favored, because estates were thereby tied up for an indefinite period. Hence, from considerations of policy, they were allowed to be barred by common recoveries, by fines and collateral warranty, without assets; and the object of the exception was to

(411) prevent an alteration of the rule of law in regard to them. So *non constat* that the rule existed in reference to conditional limitations and executory devises; and the inference, if any can be made, is that the rule did not apply to them, because it is difficult to conceive of a reason why the Legislature should wish to prevent an alteration of the rule of law in regard to them. Unlike remainders and reversions after an estate tail, they could not be barred by recovery or fine, and no consideration of policy can be suggested for allowing them to be barred by collateral warranty. There was no danger of perpetuity, because, if they take effect at all, it must happen in a limited time; otherwise as to remainders and reversions after an estate tail. Hence, the latter were not allowed the protection of the statute *de donis* against the effect of a warranty (Coke Lit., 374); and the object of the exception in the Statute of Anne was to leave them as at common law, and this, according to 2 Blackstone Com., 303, was its *sole* purpose. A right to enter for a condition broken cannot be barred by a collateral warranty. This exception to the general rule above alluded to, like that of a warranty, commencing by disseizin, is settled by the authorities. Coke Lit., 389a. "No warranty doth extend unto mere and naked titles, as by force of condition with clause of reëntry, because that for these no action doth lie; and if no action can be brought, there can be neither voucher, writ of *warrantia cartæ*, nor rebutter, and they continue in such plight and essence as they were by their original creation, and by no act can be displaced or diverted out of their original essence, and therefore cannot

be bound by any warranty." This is one of the resolutions in *Seymour's case,* 10 Rep., 97a. At page 379, Coke Lit., almost our very case is put. "A man hath issue, two sons, and maketh a gift in tail to the eldest, the remainder in fee to the puisne, upon condition that the eldest shall not make any discontinuance, with warranty to bar him in the (412) remainder; and if he doth, that the puisne son and his heirs shall reënter. The eldest makes a feoffment in fee, with warranty; the father dieth; the eldest son dieth without issue; the puisne may enter." It will be remarked that in the case put by Coke the land was passed by a conveyance at common law, by which the benefit of a condition could not be given to a third person, but inured exclusively to the feoffor or his heirs; for this reason the puisne was not entitled to the benefit of the condition by the direct force of the conveyance (as was the intention of the feoffor); but the law vested the condition in the father; from him it descended to the eldest son, and at his death descended to the puisne, who was allowed to take the benefit of it, and to enter, notwithstanding the warranty which had fallen on him as heir to his brother, and notwithstanding the condition had been suspended while it was in the eldest son. And the case is made to turn on the distinction between a condition which is suspended and a condition which is *extinct,* which would have been the case if the feoffment had been made after the death of the father, for then the eldest son would have had the condition, as heir of the father, and would have been the only person who could enter for its breach. If the eldest son had died *before the father,* the condition would not even have been suspended, and *a fortiori* the puisne could enter. In other words, if a condition, although it has been suspended, be stronger than a warranty, of course it is stronger when it has never been suspended. And we may assume, as settled by authority, that a warranty cannot bar a title of entry for a condition unless such condition has become extinct.

In the present case the condition, so far from having become (413) extinct, never was even suspended, but always remained in full force. It is the case of a *devise,* and by a conveyance under the doctrine of uses, and by a devise the benefit of a condition may be given to third persons—wherein it differs from a conveyance at common law. This is familiar doctrine.

The brothers of William Jones, then, under the devise, took the benefit of the condition by which his estate was defeated. *He died first.* What is then to extinguish the condition, to the benefit of which they are entitled? Nothing can be suggested but *his warranty,* and that, we have seen, does not bar a condition. The only way by which, in our case, it could have become extinct was by the death of the brothers of William Jones without issue, leaving him their heir. In which event, as he was

entitled under the devise to a fee, subject to the condition, and by descent would also have become entitled to the condition, so as to have both the estate and the condition to which it was subject, the condition would have become extinct. But such is not our case, and herein it differs from *Flinn v. Williams*, 23 N. C., 509, for there the fee was given to Robert Hanrahan, subject to a condition in favor of his brother William, *who died first without issue, leaving Robert his heir*, whereby the latter became entitled to the condition, and so had both the estate and the condition to which it was subject.

The question may be considered in another point of view by supposing an executory devise or a conditional limitation to confer something more than the right to take advantage of a condition, and to pass a contingent future estate, in the nature of a contingent remainder. It may be remarked that the word remainder, although it has a strict technical meaning, is sometimes used as a genuine term to denote any limitation of an estate to be enjoyed in future. Blackstone so uses it where he divides estates in reference to the time of enjoyment into such as are in possession, reversion, or remainder. Coke so uses it. As accurate
(414) a writer as Fearne so uses it; and it is sometimes so used in cases where it is not necessary to take the distinction. Treating executory devises and conditional limitations as future contingent estates, the authorities are express that they cannot be barred by a warranty, *when limited after a fee*, for the reason that such second estates in fee do not depend upon the first fee, but are entirely independent and unconnected, and cannot be displaced or diverted by any disposition which the taker of the first fee may make of it. In *Seymour's case*, 10 Rep., 97, and Coke Lit., sec. 740, where many authorities are cited, it is laid down as a maxim of law "that no warranty shall extend to bar any estate of freehold or inheritance, which is in possession, remainder, or reversion, and not displaced and put to a right before or at the time of the warranty made." And it is held that a feoffment in fee made by one who has a *determinable fee* does not displace or divest the estate limited over, "for the feoffment is not tortuous, and passes only the determinable fee. But when a tenant for life or tenant in tail makes a feoffment in fee, the feoffment is tortuous, for they cannot give a fee, and the remainder and reversion is thereby displaced, and the one causes a forfeiture and the other makes a discontinuance. But when he who hath a fee, although it be determinable, maketh a feoffment in fee, he who hath a fee simple giveth a fee simple, and thereby he doth no wrong to his heirs, and *by consequence no wrong* to him in remainder," and it is neither a forfeiture nor a discontinuance. In our case William Jones had a fee, determinable upon his death without a child, with an executory devise over in that event to his brothers, and having a fee, a feoffment in fee by him would

not have been tortuous, and by consequence his warranty does not bar his brothers, whose estate was not divested or displaced. In the more modern authorities I have been able to find *nowhere an intimation* that a fee limited upon a fee by way of conditional limitation or executory devise (if we except the case of *Flynn v. Williams,* 23 (415) N. C., 509), can be barred or destroyed by a warranty descending from the taker of the first fee upon the puisne, to whom the second is limited. On the contrary, it is laid down in general terms that such limitations cannot be defeated by a common recovery or a fine, or in any other way, and hence the necessity of fixing a limit as to time. Blackstone lays it down that a remainder or reversion, after an estate tail, may be barred by a collateral warranty, if the remainderman or reversioner be the heir of the tenant in tail; but he nowhere intimates that such a consequence would follow the warranty of the taker of the first fee, in the case of a conditional limitation or executory devise. Hargrave, in his argument in *Wicker v. Mitford* (see his Law Tracts, 518), says: "When executory devises were first permitted, it was seen that entails in that form could not be barred by fines or recoveries." "Entails by executory devises being *thus excepted from any legal* mode of barring them, it became necessary to prescribe limits," etc. Note to Fearne, page 444, ch. 3. Hargrave also says in his second argument in the *Thellusson case:* "Executory devise was not regularly admitted until almost two centuries ago. The rules for circumscribing it are consequently not of earlier date and there are no statutes for the purpose." "It was soon settled by the courts of law that executory devises could not be barred by common recoveries; that as early as *Pells v. Brown,* 17 James I." "But executory devises thus *unbarrable by recovery or otherwise,* if some limit had not been devised, would have been a shelter for perpetuity." Note to Fearne, page 429, ch. 2, title Executory Devise. Certainly this accurate writer and learned conveyancer would not have used such sweeping words of exclusion if a collateral warranty was a bar, and an unreasonable doctrine of the old law had been applicable to what he treats as the modern doctrine of executory devises and conditional limitations. Fearne in his treatise on executory (416) devises, 418, says: "The great and essential difference between the nature of a contingent remainder and that of an executory devise consists in this: the first may be barred or destroyed or prevented from taking effect by several different means, as I have already shown; whereas it is a rule that an executory devise cannot be prevented or destroyed by *any alteration whatever* in the estate out of which or after which it is limited," and cites *Pells v. Brown,* Cro. Jac., 560, to show that they cannot be barred by a recovery, and many other cases, on page 424. "Though in general an executory devise cannot be barred by the first taker, yet

when it is limited after an estate tail it may be barred in some cases by recovery." 428. "This privilege of executory devises which exempts them from being barred or destroyed is the foundation of a rule with respect to the contingency upon which an estate of this sort is permitted to take effect." Fearne makes an express allusion to the effect of collateral warranty, and no case is referred to in which the question was stirred. My impression is, after it was settled that such limitations could not be barred by recovery or fine, it was taken for granted that it could not be done by a warranty; hence no case has occurred. I do not consider *Flynn v. Williams* as an authority for the position that such limitations can be barred by a collateral warranty. In one view, treating the devise as giving to William Hanrahan the benefit of a condition by which the estate of Robert Hanrahan was subject to be defeated: as William *died first*, leaving Robert his heir, the condition was transmitted by descent to Robert and became *extinct*, as is shown above. In the other view, treating the devise as giving to William a contingent fee, limited after a fee to Robert: as William died first, leaving Robert his heir, the contingent fee was transmitted by descent to Robert, and so he had both the first and second fee, and the estate vested in him
(417) out and out. Of course, he could not set up claim to the estate against his own bargain; upon his death his heirs, the lessors of the plaintiff, could not do so, for two good and sufficient reasons: *First*, they were estopped *by his deed* from claiming the land as *his heirs*. *Second*, the warranty was *lineal*, and they could not claim the land as derived by descent from him in opposition to his warranty. This is clear, for if they had recovered the land it would have been assets by descent from him, subject in their hands to his covenants. So plain and reasonable a proposition needs no authority; and the case was correctly decided against them, upon the ground of a lineal warranty. It is true that his Honor, *Judge Daniel*, goes on to cite a case put in Sheppard's Touchstone, of a warranty by a tenant in tail, which was held to bar the remainderman, upon whom it descended, as heir of the tenant in tail. There is no question as to the warranty in that case being a bar, although it was collateral; but it had no application to the case under consideration; and the general remark as to collateral warranties, with which he concludes his opinion, and which he predicates on that case, was not warranted by it, and was uncalled for by the case then before the Court.

My conclusion is that as the fee limited to William Jones *was* defeated by his death, without leaving a child, his warranty does not bar his brothers from asserting their title to the fee, which in that event was limited over to them. This conclusion is upon the supposition that William Jones made a feoffment with warranty; but in fact he made a

bargain and sale, which is by no means as strong a conveyance, and if the former does not bar, of course the latter cannot. How far a warranty in a bargain and sale differs in its effect from one in a feoffment, and to what extent it is less stringent as a bar to the heirs, opens a wide field upon which it is not necessary to enter.

I have treated the case upon the supposition that the convey- (418) ance had the effect of a "feoffment," because treating it as a mere "bargain and sale," the question is not an open one. It is settled by *Seymour's case,* 10 Rep., 97, which decides that a bargain and sale, with general warranty by a tenant in tail, does not rebut the remainderman upon whom the warranty falls as heir. If the warranty does not rebut one who claims in privity of estate, and whose estate depends on and is supported by the preceding estate, of course it does not rebut one who is not a privy in estate, and who claims a fee independent of and unconnected with the first fee, which is subject to a condition, by which it may be defeated, so as to make room for the second fee. And I have treated the warranty as a *"covenant real,"* because treating it as a covenant of "quiet enjoyment," the question is not an open one. It is settled by *Jacocks v. Gilliam,* 7 N. C., 47, which was brought before the Court a second time *(Gilliam v. Jacocks,* 11 N. C., 310), and after full and labored arguments reaffirmed. I may be allowed to cite particularly the learned opinion of *Judge Henderson,* who, treating the warranty as a covenant real, proves conclusively that such a warranty in a deed of bargain and sale, by a tenant in tail, does not rebut the remainderman, because that conveyance did not work a discontinuance, of course such a conveyance and warranty does not rebut the taker of the second fee. When a fee is limited after a fee, his estate is not discontinued by a feoffment, nay, not even by a *recovery,* and there is nowhere an intimation that he is rebutted by warranty. I confess that, after a laborious examination of the "curious and cunning learning" of warranty, I was gratified to be able to arrive at the conclusion that by the combined efforts of the Statute of Anne and the act of 1784, which converts all estates tail into estates in fee, there is now *no case* in which a warranty bars the heir from setting up a claim which is not derived from the ancestor who made the warranty, and I must regret that my (419) brother judges are of opinion that there is still *one case* to which that bad doctrine applies. Some good reason, no doubt, existed for the rule in early times in the cases to which it applies, but we are not now able to trace them, so as to relieve it from manifest hardships and injustice. Purchasers are sufficiently protected by the remedy against the personal representatives and the heirs of the warrantor in case assets descend—treating the warranty as a personal covenant, annexed to the estate and running with it, as a safeguard. In this way the warranty

as a covenant of quiet enjoyment protects the estate which a vendor in possession professes to pass, and not simply the estate which actually *does pass* by a deed of bargain and sale (*Lewis v. Cook, ante*, 193), by enabling the bargainor or his heirs, or the assignee of the estate in case of eviction, to recover damages of the bargainor and to reach the assets, personal or real; and although if collateral it can in no case be used as a bar, still it is a better safeguard to purchasers and meets more fully the intention of the parties and the ends of justice than if it be treated as a covenant real, subject to the rules applied to it by the old cases. For instance, by the resolutions in *Seymour's case*, if tenant in tail makes a bargain and sale in fee with warranty, inasmuch as by that mode of conveyance only such estate passes as he can rightfully pass when *that estate* determines, the warranty is no longer of any force or effect, and can neither be used to bar the remainderman with or without assets, nor to bind the heirs of the bargainor, although assets descend, for it makes no discontinuance, and the remainder is not displaced. So if a tenant for life makes a bargain and sale, in fee with warranty, only his life estate passes, and at his death the warranty is of no force or effect, because the estate in remainder or reversion was not divested, and there was no forfeiture. Thus warranties in deeds of bargain and sale, according to the old rules, furnished no protection to purchasers. While
(420) the estate of which the bargainor might lawfully pass continued, there was no use for the warranty; after it determined, the warranty was of no force or effect. After the action of ejectment superseded real actions, as in that action there could be no voucher, the courts construed a warranty to be a convenant of quiet enjoyment, and gave an action for damages in case of eviction. In this State, where bargain and sale is the only mode of conveyance in use, the courts have acted on the assumption that, as the warranty was a convenant of quiet enjoyment, it did not determine with the estate which the bargainor might rightfully pass, but protected the estate which he professed to pass, and have accordingly sustained many actions for damages after eviction by title paramount, which could only occur after the estate that the bargainor might lawfully pass had determined; and in fact this is the only mode of giving to warranties, in deeds of bargain and sale, any effect whatever.

These last remarks are not necessary to the conclusion at which I have arrived; but, in a general point of view, they tend to support it, by showing that the courts have been obliged, in numberless cases, to depart from the artificial (and to us unreasonable) rules of the old doctrine of warranty, by treating them as inapplicable to the convenants in our deeds of bargain and sale, in order to give effect to such covenants, carry out the intention of the parties, and meet the ends of justice. So every

action in which plaintiffs have recovered upon a warranty, treated as a covenant of quiet enjoyment, is an authority for the position that the covenant does not cease to be of effect *as soon as the estate which the bargainor might lawfully make had determined.*

Cited: Southerland v. Stout, 68 N. C., 450; *Board of Education v. Makely,* 126 N. C., 698; *Wiggins v. Pender,* 132 N. C., 638.

Sustained as the law, instead of opinion of Court (*ante,* 225); *Myers v. Craig,* 44 N. C., 173.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT MORGANTON

AUGUST TERM, 1852

THE STATE TO THE USE OF SAMUEL CHUNN v. M. PATTON ET AL.

1. A constable received claims to collect from solvent persons in February, 1842. The sureties on his bond were sued in October, 1845, for his failure to collect: *Held*, that the statute of limitations did not bar the suit.

2. Where there is error in the charge of a judge, and it is excepted to, there must be a *venire de novo*, unless the appellee can show conclusively from the record that the error could not in anywise have affected the verdict.

APPEAL from *Battle, J.*, at Fall Term, 1851, of BUNCOMBE.

J. Baxter for plaintiff. (422)
N. W. Woodfin for defendant.

PEARSON, J. The action is against the defendants as sureties on the bond of a constable, dated 16 February, 1842. The relators, in February, 1842, put several claims in the hands of the constable for collection; among others, these small claims upon persons who were admitted to be good. The writ issued in October, 1845, and the defendants relied on the statute of limitations. His Honor charged the jury that if the constable could have collected these small claims between February and October, 1842, his omission to do so was a breach of the bond and gave the relators a cause of action immediately against the defendants, and they were protected in regard to their claims by the statute of limitations. To this the plaintiff excepts. There is error. The omission to collect was a breach of a continuous nature. Admit there was a breach by a failure to collect before October, 1842, *non constat* that there was not a breach for a failure to collect after October, 1842, to which latter breach the statute of limitations was, of course, no bar. The plaintiff was not obliged to sue for a breach before October, 1842, and had the same or even more cause of complaint because of an omission to collect

between October, 1842, and February, 1843, when his office expired. Defendant's counsel, admitting the error, insist that it was immaterial, for that the jury found for the relators and allowed them damages in regard to their then small claims, notwithstanding the charge of the court. The verdict is for $14 damages. It may well be that this is for a breach in regard to some of the other claims, but it is sufficient to say that when there is error in the charge, and it is excepted to, (423) there must be a *venire de novo*, unless the appellee can show conclusively from the record that the error could not in anywise have affected the verdict.

PER CURIAM. *Venire de novo.*

PLUMMER'S ADMINISTRATOR v. WORLEY, ET AL.

A *bona fide* purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person.

APPEAL from *Manly, J.*, at Spring Term, 1852, of BUNCOMBE.

N. W. Woodfin for plaintiff.
J. Baxter for defendant.

RUFFIN, C. J. This is an action of trover for a horse, to which the plaintiff's intestate claimed title by purchase from one Randall. The defendant gave evidence that the alleged purchase was made for the express purpose of defeating divers creditors of Randall, who were then suing him, and that Randall kept possession of the horse and used (424) it as his own, and a few days afterwards sold him to the defendant, who purchased *bona fide* and for value. Counsel for the plaintiff insisted that he was entitled to recover because the fraudulent sale of the intestate was not void against the defendant, though he were a *bona fide* purchaser from the vendor, and because it did not appear that any of the demands against Randall remained unsatisfied at the trial. The court refused to give that instruction, and told the jury that, in the case supposed, the plaintiff was not entitled to recover. Verdict and judgment for defendant, and plaintiff appealed.

It is to be assumed upon the bill of exceptions that the defendant's purchase was for the full value of the horse and without the notice of the conveyance to the intestate, since no objection was taken on either point. Taking that to be so, the judgment must be affirmed. It is

true that the statute 27 Eliz., is in its terms confined to land; but it has been often said that it was but in affirmance of the common law. Besides, it is in respect to personal things so obvious that a conveyance by the owner without consideration, and with the sole intent to baffle creditors, in which there was no change of the apparent ownership and possession, was made upon a secret trust for the former owner, and with the intent that he should have the enjoyment and disposition of the property as before, as to render it not only void as against the creditors, but to require, in furtherance of good faith towards those who deal for the thing with him as the owner still, that it should be held, also, either that the first conveyance is void as to *bona fide* purchasers or that the donor and possessor had an authority, as the secret *cestui que trust* or as the agent of the fraudulent donee, to dispose of the property by sale. If he should do so and get a fair price for it from an innocent purchaser, nothing could be more palpably dishonest than that the fraudulent donee should set up his title to the prejudice of the second pur- (425) chaser. Then, as to the other point, it is clear that the fraud in thus drawing in an innocent man to lay out his money is not purged by the fact that his vendor afterwards paid the debts he then owed, supposing that fact to have appeared.

It may be that he did so with the money the defendant gave for the horse, and, at all events, it is not material to the question of fraud between these parties.

Honest and fair dealing between man and man forbid a recovery upon a title so corrupt against a *bona fide* purchaser in open market, as it were, from the former owner and possessor of the horse.

PER CURIAM. No error.

Cited: Long v. Wright, 48 N. C., 293; *Bynum v. Miller,* 86 N. C., 563.

DEN ON DEMISE OF WILLIAM H. GREEN v. JOHN COLE.

1. It is not necessary for a purchaser at an execution sale to produce a judgment corresponding exactly with the execution, nor, it seems, any judgment at all.

2. Courts have power to amend their process and records, notwithstanding such amendment may affect existing rights.

APPEAL from *Manly, J.*, at Spring Term, 1852, of RUTHER- (426) FORD.

G. W. Baxter and W. M. Shipp for plaintiff.
J. Baxter for defendant.

RUFFIN, C. J. The lessor of the plaintiff claimed title under a sheriff's sale and deed as follows: He produced the record of a suit and recovery in the County Court of Rutherford by Drury Scruggs against Joseph Roach, William H. Green, and Ambrose Roach, at July Term, 1841. The suit began by a warrant before a justice of the peace in favor of Scruggs against Joseph Roach and Green, and on 23 May, 1840, judgment was rendered thereon for $40, with interest thereon from 25 December, 1839, until paid, and 80 cents cost, which was stayed by Ambrose Roach. A *fieri facias* was issued thereon in January, 1841, which was levied on the premises in dispute as the land of Joseph Roach on 4 May, 1841, and returned to the next county court in July, 1841; and also the copy of a notice to Joseph Roach from the constable of his intention to return the same; and at that term a minute was taken by the clerk that the judgment before the magistrate above recited is readjudged to the plaintiff and confirmed by the court, and the land returned as levied on, condemned and ordered to be sold to satisfy the same, with costs. A *venditioni exponas* then issued, omitting the name of Green, on which the sheriff returned a sale of the land to Achilles Dreshour for $5, and, subsequently, the plaintiff, by leave of the court, sued out writs of *fieri facias*, and from time to time, up to November, 1842, for the balance due; and he then took out one against the goods and chattels, lands and tenements of Joseph
(427) Roach, Ambrose Roach, and William H. Green, commanding the sheriff to make the sum of $40, with interest thereon from 25 December, 1839, which Drury Scruggs recovered against them, together with the further sum of $3.85; and thereon the sheriff offered the premises again for sale, and they were purchased by the lessor of the plaintiff, which was returned on the writ to February Term, 1842, and the sheriff afterwards made him a deed. It appeared further from the record that, in entering the judgment at July Term, 1841, the name of William H. Green was omitted as one of the defendants, and that it was afterwards inserted by order of the court, at April Term, 1842, on the motion of the plaintiff to amend. The defendants then gave in evidence the record of a recovery by Alfred McKinney against the same Joseph Roach, and that under a *fi. fa.* thereon the defendant became the purchaser of the premises in 1845, and took a deed from the sheriff.

Counsel for the defendant insisted that the plaintiff could not recover, *first*, because there was no judgment to support the writ of execution under which the lessor of the plaintiff purchased; and, *secondly*, because of a variance between the judgment, if there be any, and the *venditioni*

exponas in the omission of Green's name as a defendant, and in stating the costs, and in other respects. But the court refused to give instructions on these points in favor of the defendant, and after a verdict and judgment against him, he appealed.

The Court concurs in the opinion of his Honor. According to the loose mode of making entries, which the profession for their own ease tolerate, the courts are obliged to hold, where the judgments are drawn collaterally in question, that the minutes of the clerk stand for the judgment, and that a proper judgment, such as it should be if duly drawn up, is to be presumed. The security of suitors, officers, and (428) purchasers imposes on the courts that rule as an absolute necessity. But even that is not material to the plaintiff's recovery, since he is not obliged to show a judgment at all in this case, much less one to which the execution was in exact conformity, as was held in *Rutherford v. Raburn,* 32 N. C., 144. Counsel for the defendant contends against the correctness of the case, considering it as laying down the doctrine that the act of 1848, ch. 53, operates retroactively, and that such operation is judicially sustainable, though it affect existing rights. It is said that here, for example, the defendant purchased when there were such variances and defects in the judgment and executions under which the lessor of the plaintiff had before purchased as were fatal to his title, and that the defendant was induced by a knowledge of that fact to lay out his money in the subsequent purchase; and that, having then got the title, he holds it secure from future litigation. Undoubtedly the court would hold, were the language of the statute doubtful in respect of its retrospective as well as prospective operation, that it was intended to be the last only, and, were the language unequivocally retroactive, the Court would be obliged to hold further that, in that respect, the Legislature had transcended its constitutional power. The Legislature cannot interfere with vested rights of property. *Hoke v. Henderson,* 15 N. C., 1. But this seems clearly to the Court not to be a case of this kind. The statute in question is altogether prospective in its terms and operation, and, *proprio vigore,* does not apply to the controversy between these parties. Neither claims under the enactment of the statute. The question between them is of a different nature entirely. It is whether at the common law and without any statute on the subject a purchaser at a sheriff's sale is bound to sustain the execution by showing a judgment with which it accords, or whether he does not get a good (429) title under the execution, which justifies the sheriff, without producing a judgment at all. Now, upon that question there were conflicting judicial opinions and resolutions. Prior to 1812 it had been immemorially held that, except in some special instances, a purchaser was not obliged to show a judgment, but the execution was sufficient for

him. But in that year it was decided otherwise in *Hamilton v. Adams*, 6 N. C., 161, and subsequently it had been held as a corrollary that the judgment and execution must be in exact accordance. Now, this new doctrine had never been adopted in the common-law courts of our sister states, had never been satisfactory to the profession here for the reasons given in *Rutherford v. Raburn, supra*, and proved with more experience to be more and more inconvenient. When, therefore, a case arose in which the question was again presented, as one at the common law, it was necessary to be considered by the judges to which class of adjudications they should submit, as evidence of the law. Now, it is true that they might probably have continued in the course of their immediate predecessors, as they had before done, but for the aid derived from discovering, in the act of 1848, that a sense of the inconvenience and mischief of the new rule had reached the community generally, and through it the Legislature also, and that, to some purposes at least, a legislative remedy had been enacted. In that state of things the Court not only felt at liberty, but bound, to recur to principle in deciding the question, which led them, both upon the reason of the thing and from respect to the legislative policy, to adopt the ancient decisions as being still the law of the country. That did not at all interfere with vested rights by any new law. It simply determined that, by the old, which is held to be the existing law, the party had no rights. It is a case merely of a change in judicial opinions as
(430) to what is the law. The rights of persons dependent on the question when *Hamilton v. Adams* was decided were affected pricipally, as those existing at the time of *Rutherford* and *Raburn*. Indeed, there might be the same objection urged against overruling at present this last case, since it would affect the rights of persons who, in the meantime, have acted on the faith of it as law—a consideration always extremely grave in the mind of a judge and leading him to follow precedents rather than unsettle the law or shake titles, as long as he sees he can do so without producing more evils than overruling them can possibly bring about; but it is inseparably incident to human tribunals that opinions should vary upon questions, what is the law, and that the course of adjudication at one period should be modified at another, and men must deal subject to that degree of uncertainty as to the rule of law on a particular point—an uncertainty which probably pervades our country, and that from which we derive the elementary principles of our law and the model of our judiciary less than any others that ever existed.

The Court concludes, therefore, that the variances insisted on are not material, and would not invalidate the title of the lessor of the plaintiff

in fact. However, the most important difference no longer exists, as it was removed by the amendment. It was argued, indeed, against that, also, that it affected rights, and therefore its operation should be accordingly restrained. But the argument must fail, since it goes to the whole power of amendment, as the very necessity for amending arises out of the invalidity of the proceeding unless amended, and every amendment must therefore affect the rights of persons. But it is among the most beneficial powers of courts, intended and usually exercised to further justice and to sustain what has been done under the supposed authority of the law. Every person must be, therefore, understood to act, in such cases as the present, with a knowledge that the courts can and, in cases deemed proper by them, will amend their records and process so as to (431) promote justice as far as they can do so consistently with the truth. Besides, the propriety of an amendment cannot arise collaterally in another court, as the record in the present shape is to be received as conclusively speaking the truth.

No error.

PER CURIAM. No error.

Cited: Marshall v. Fisher, 46 N. C., 117; *Pendleton v. Pendleton,* 47 N. C., 137; *White v. Stanton,* 48 N. C., 42; *Parsons v. McBride,* 49 N. C., 100; *Barnes v. Hyatt,* 87 N. C., 317; *Hinton v. Roach,* 95 N. C., 111; *Wilson v. Taylor,* 98 N. C., 280; *Marshburn v. Lashlie,* 122 N. C., 239.

JOHN KILLIAM, ADMINISTRATOR, ETC., v. JAMES CARROL.

One who is an equitable owner of a bond, but to whom it has not been legally endorsed, has not such an interest in it as will enable him to support an action of trover.

APPEAL from *Battle, J.,* at Fall Term, 1851, of HAYWOOD.

Trover brought to recover the amount of a bond alleged to belong to the plaintiff's intestate, and which had been converted by the defendant. It appeared that the interest in the bond was, in fact, in the intestate, but the bond had never been legally transferred to him.

Under the instructions of the court a verdict was found for the plaintiff, and from the judgment thereon the defendant appealed. (432)

N. W. Woodfin for plaintiff.
J. Baxter for defendant.

NASH, J. We do not concur with his Honor who decided this case below. There can be no doubt that the defendant, throughout the transaction, has acted most dishonestly, in entire disregard of any principle of moral duty; but siting in a court of law we can enforce none but legal obligations. It is fully admitted that the plaintiff has no legal right to the bond appropriated by the defendant. The defendant purchased a Bible at the sale of his personal property, and after some time the note was found in it. Who put it in there or where or when is not stated, if known, but it is claimed against the plaintiff, as the administrator of Jones, simply upon the ground that it was so found. It is true, when shown to the witness Enlow, by the defendant, the latter was informed that it belonged to the intestate, but without adverting more particularly to the position which this witness by his own statement occupies in relation to the dishonest transaction, it is sufficient to say that the note is not endorsed by the person to whom it was made payable, and in whom the legal title still remains. In the opinion of his Honor there is error in charging the jury that if the facts were as insisted on by the plaintiff, he was entitled to a verdict.

The judgment is reversed and a *venire de novo* awarded.

My brethren instruct me further to say that the defendant did not tortiously take possession of the note under the circumstances of the case.

RUFFIN, C. J. Enlow, the obligor in the bond, stated that it belonged to the plaintiff's intestate, and the instruction prayed by the (433) defendant admits the equitable right to it to be in the intestate, and therefore it is to be assumed that the intestate was the equitable assignee of the bond without an endorsement to him. But admitting these facts, it is still true that the intestate had no such ownership or interest in the bond as can be recognized at law so as to enable him to bring trover or any other action, because the property in a bond can only be transferred in the manner prescribed by the statute. *Fairley v. McLean*, 33 N. C., 158. That being so, and there having been no contract between the intestate or the plaintiff with the defendant respecting the bond, the defendant has done no such legal wrong to the possession of the plaintiff or to his right of property as will sustain the action. Therefore, I agree with my brother NASH that there must be a

PER CURIAM. *Venire de novo.*

(434)

SAMUEL TUCKER v. THE JUSTICES OF IREDELL COUNTY.

A public agent is not answerable personally for any contract made by him in his official capacity, unless he specially binds himself to be personally responsible.

APPEAL from *Manly, J.*, at Fall Term, 1851, of IREDELL. The case is sufficiently stated in the opinion.

Guion and Boyden for plaintiff.
W. P. Caldwell for defendant.

NASH, J. Upon the return of the mandamus in this case the defendants, through their counsel, moved to quash the suit upon the ground that it appeared on its face that the plaintiff had a full and complete remedy at law by a suit against the county trustee for money had and received to his use. The plaintiff had, under a contract made with the commissioners duly appointed by the County Court of Iredell, built a public bridge for the use of the county, which had been received by the commissioners, and the court thereafter had made an order that the county trustee should pay the amount due. This order was presented to the trustee, but not paid, for want of funds. At the next court the above order was, by the county court, rescinded, the bridge having in the meantime fallen down. The ground taken by counsel for the defendants, in his motion to quash the writ, was not correct. The plaintiff could maintain no action whatever against the county trustee. The latter was a public agent, and therefore not answerable personally for any contracts made by him in that capacity unless he had bound him- (435) self personally. *Hite v. Goodman,* 21 N. C., 364; *Dameron v. Irwin,* 30 N. C., 421. The county trustee did not in any manner make himself personally answerable for the debt. Nor could he, by promising to pay the order out of the county funds when they came to hand, deprive the county court of their control over the money. They were themselves but trustees for the public, and while the money was in the possession of the county officer they had entire control over it. The trustee can pay no money out but under the order of the court, and before he had so done there was no order in existence authorizing him to make the payment.

PER CURIAM. Affirmed.

Cited: Day v. Lee, 49 N. C., 240.

(436)

HARVEY D. CARRIER v. ADAM HAMPTON.

1. On the trial of a collateral issue between the administrator and heirs, as to assets, in a suit by a creditor, one of the heirs is an incompetent witness for the administrator, though he may have released to him all his interest in the personal estate, and also an amount supposed to be the value of the real assets descended to him.

2. In such a proceeding by *sci. fa.* any one of the heirs can tender the issue, and, if found against the administrator, the creditor would have execution against him for the sum found in his hands, which would necessarily operate to the exoneration *pro tanto* of all the real estate descended.

See same case, 33 N. C., 307.

APPEAL from *Battle, J.*, at Fall Term, 1851, of McDOWELL.

Bynum, N. W. Woodfin, and W. M. Shipp for plaintiff.
Avery, J. Baxter, and G. W. Baxter for defendant.

RUFFIN, C. J. After the decision between these parties at August Term, 1850, 33 N. C., 307, the case came on again in the Superior Court, and, on the trial, the plaintiff again offered as witnesses the two sons of his intestate, who were before deemed incompetent. They released to the plaintiff their distributive shares of their father's personal estate, and the plaintiff released to them respectively all claim for the costs of their suit. The defendant then gave evidence as before, that certain creditors of the intestate, after getting judgments in suits against the plaintiff as administrator, in which his plea of *plure administravit*
(437) was found for him, issued writs of *scire facias* against the heirs, to have execution against the estate, to which the heirs had not as yet pleaded, though still pending; and further, that lands in Tennessee descended to the heirs, of which the value was unknown; and also that the intestate had sold in his lifetime certain lands in this State, reserving to himself and his heirs the mines and minerals therein, and that after the expiration of two years from the granting of administration to the plaintiff, all the heirs had sold and conveyed that right to the purchasers of the land, and that the two sons, tendered as witnesses, received for their interest $10 each, and that it was not known that there were any minerals in the land, or that the interest was of any value. Thereupon the witnesses executed a further release to the plaintiff of their right to make up a collateral issue as to personal assets in the suits against them by the creditors as to the sum of $10 each, with the interest thereon from the date of their sales, and then they were admitted and gave material testimony, and the plaintiff had a verdict and judgment, from which the defendant appealed.

The Court is of opinion that, in respect of the realty in this State, the case is not varied by the new facts from what it was before. These two persons have precluded themselves from making up an issue with the administrator, but they cannot control the defendant and the other heirs in that respect, and it seems clear that any one of them could tender the issue, and if found against the administrator, the creditor would have execution against him for the sum found in his hands, which would necessarily operate to the exoneration *pro tanto* of all the real estate descended. That one of the heirs could make up the issue is apparent from the consideration that most frequently the personal representative is also an heir and devisee, and no particular provision is made for that case, and yet the constant course has been to proceed in such cases at law, and without resorting to the court of equity.
The witnesses were liable for the want of personal estate to the (438) creditors for the value of the estate reserved by their father in the lands sold by him, which, *prima facie* at least, is to be taken as not less than the price got for it, and at all events is something.

From that liability they may be relieved by some of the heirs compelling the creditors to resort to the personal fund, and these witnesses still have an indirect interest in the personalty, notwithstanding their release to the plaintiff. It is said, however, that they have discharged themselves from liability to the creditors by divesting themselves of the money received by them for the land. But assuming that to be the value, this position is not correct, as the money has not been paid to a creditor, and does not belong to any one or all of them, and the deposit with the clerk or any other person for the use of the creditors could not be pleaded by these persons in bar to the *scire facias,* but they remain just as much liable now as they would be if they had thrown the money away. As that is so, it is useless to consider how far their competency might be affected by the possible liability at law in Tennessee of the lands in that State, or the personal liability in equity of the witnesses in this State or in Tennessee in respect of those lands.

PER CURIAM. *Venire de novo.*

(439)

DOE ON DEMISE OF JACOB MILLER v. ROBERT C. MELCHOR.

1. Although in an action of ejectment the usual course is to recover nominal damages, leaving the real damages to be recovered in the subsequent correlative action of trespass for the *mesne* profits, yet it would not be error to direct that the actual damages should be assessed in the ejectment, the division of the actions being merely for convenience.

2. Therefore, it is no objection to the report of arbitrators, to whom an action of ejectment has been referred, to direct the amount of damages sustained by the trespass to be entered for the plaintiff.

APPEAL from *Manly, J.*, at Spring Term, 1852, of CABARRUS.

Ejectment, which was referred to arbitration. The arbitrators reported, among other things, that judgment should be entered for the plaintiff for $10, as the actual amount of the damages he had sustained by the trespass. To this part of the award the defendant objected, and moved that the award be set aside. The court overruled the motion and gave judgment pursuant to the award, from which the defendant appealed.

Boyden for plaintiff.
Gaither and H. C. Jones for defendant.

PEARSON, J. If the arbitrators had exceeded their authority in assessing $10 as damages instead of "sixpence," the objection would not extend to the whole award as far as the amount is divisible. The excess could be rejected as surplusage. But the arbitrators did not exceed their authority. It was proper for them to assess the actual damages, (440) so as to make the award final, and prevent the necessity of an action for mesne profits, which, when confined to the time laid in the demise, is a mere elongation of the action of ejectment; that action being divided, at the suggestion of the court, into two parts in order to save time and merely as a matter of convenience.

The declaration in ejectment demands damages, and originally nothing else was recovered. Afterwards the court made the remedy more adequate, by adding a writ of possession, but in form it is still an action for damages only; and when, by the adoption of the fictions invented by *Chief Justice Rolle*, ejectment became the most convenient, cheap, easy, and speedy remedy, as well for all having an estate of freehold as for those having estates less than freehold, and when, in consequence thereof, ejectment almost universally took the place of real actions and became the mode of trying titles, it was seen that a great deal of time was unnecessarily in many cases consumed in the examination of witnesses and in the discussion of the question of damages; for, if upon the title the case was with the defendant, then the expense of witnesses in general to the amount of damages and the time consumed in their examination and the discussion incident thereto, was "labor lost"; and in the cases where an inquiry as to the question of damages was made necessary by a verdict in favor of the plaintiff

upon *"the title,"* such inquiry had a tendency to distract the jury and call off attention from the main question, and it was better for both parties to postpone it. Hence it was suggested by the Court, and acquiesced in by the profession, that the action might be divided, so as to let the question of *title alone* be passed on in the ejectment, with nominal damages, "for conformity," if the title was with the plaintiff, and leave the amount of damages to be ascertained by an action for the mesne profits.

This has been the universal practice, but it would not be error for the court to instruct the jury that, if they found for the plaintiff upon the title, they were at liberty to find actual damages for the (441) time the defendant had wrongfully kept the lessor of the plaintiff out of possession; and in some cases it is necessary for the jury, in the action of ejectment, to find the actual damage, as if the lessor be to pay rent for years, when the term expires pending the action, or tenant for life, or *pur autre vie*, and his estate terminates pending the action. In such cases an action for mesne profits cannot be brought, because it is an action of trespass *quare clausum fregit,* and it is necessary to regain the possession so that, by the fiction, it can relate back to the prior possession; and as this cannot be done, the amount of damages must be assessed in the action of ejectment. It is a plain analogy, as arbitrators are required to make a final award, and no secondary action is contemplated, that when an action of ejectment is referred, the actual damages should be assessed according to the form of the action and the ancient practice.

The second exception, that the award is vague and uncertain, is not well founded. It fixes upon a certain line as the dividing line between the parties, and it is plainly to be intended that the lessor is to be put into possession up to this line. So the Court is enabled to give judgment for the entire damages and cost and to order a writ of possession in favor of the lessor. Herein it is plainly distinguishable from *Duncan v. Duncan,* 23 N. C., 466, which was relied on by the defendant. There the referees said that the plaintiff had paid the defendant $1,544, and conveyed to her three-fourths of the whole amount of land purchased of the executors of Charles Findley, deceased, to be taken off of the upper part of said land. The award was uncertain and vague, because it did not show what land had been purchased of the executors of Findley, and it did not fix on any definite line by which the portion allowed was to be taken off of the upper part; so that judgment could be rendered by which to carry the award into effect, because to do so required a conveyance and a deed for a specific performance, which could not be made in ejectment. (442)

Third. There is no force in the last exception. The arbitrator, by aid of the surveyor named in the order of reference, had fixed on a line up to which the lessor is entitled to have possession; they have assessed entire damages and have disposed of the costs.

This is, it seems to us, a final, complete disposition of all the matters referred.

PER CURIAM. Affirmed.

Cited: Moore v. Gherkin, 44 N. C., 74; *Bradley v. McDaniel*, 48 N. C., 130; *Gaylord v. Gaylord, ibid*, 369; *Stancil v. Calvert*, 63 N. C., 617; *Whissenhunt v. Jones*, 78 N. C., 363; *Denmark v. R. R.*, 107 N. C., 188.

DANIEL SMITH v. RINSON JONES ET AL.

Whether an instrument is a mortgage or not is a question of law for the decision of the court, and it would be error to submit it to the jury.

APPEAL from *Manly, J.*, at Fall Term, 1850, of ASHE.

Mitchell for plaintiff.
T. R. Caldwell for defendant.

NASH, J. Both the plaintiff and the defendants claimed the horse in question under Pennington; neither is, therefore, at liberty (443) to dispute his title. Plaintiff's title is the elder. He purchased from Pennington, by taking up executions against him and paying some money. Some time after this another execution in favor of one Gentry was, by the defendant Jones, levied on the mare, and at the sale the defendant Phipps purchased. At the time of the levy and the sale the animal, as between these parties, was the property of Smith, the plaintiff, so far that the defendants could not deny it, except by showing that, as against them, he did not acquire Pennington's title.

Counsel for the defendant asked the court to instruct the jury that, if the transfer of the property by Pennington to the plaintiff was a mortgage, it was void, as not being in writing and not registered. This was properly refused by the court. Whether the transaction was a mortgage or not was a question of law, which did not belong to the jury, but to the court. It would have been error in law for the court to have so charged; and, moreover, because the evidence showed that it was not a mortgage.

PER CURIAM. No error.

(444)

STATE OF NORTH CAROLINA ON THE RELATION OF A. J. PATTEN v. WILLIAM MANN.

A sheriff is not bound to collect an execution, and pay the amount to the plaintiff, before the return day of the writ.

APPEAL from *Battle, J.*, at Fall Term, 1851, of MACON.

J. Baxter for plaintiff.
Gaither for defendant.

PEARSON, J. In September, 1850, a *fieri facias* in favor of the plaintiff against certain persons, who were good and had property out of which the money could have been made, was put in the hands of the defendant, who was sheriff, with instructions to make the money as soon as he could. In December, 1850, the plaintiff demanded the money of the defendant, and he refused to pay, on the ground that he had not collected it, whereupon the plaintiff commenced this action. The *fieri facias* was returnable to March Term, 1851. The writ issued 20 September, 1850.

The question presented is whether a sheriff is bound to make the money within a reasonable time after an execution is put into his hands, or may, without a breach of duty that will subject him to an action, omit to make the money until just before the return day.

The action is of first impression, and although it cannot for that reason be rejected at once, still there is a presumption against it, and the plaintiff has a heavy weight upon him—the task of showing that, according to the reason of the thing (which had never before occurred to anybody else), he had a cause of action for an omis- (445) sion to collect before the return day of the writ.

This makes it necessary to recur to fundamental principles in order to see if any good ground to support the action can be inferred from the facts of the case. The action is *ex contractu*. The only evidence of the contract is that the *fieri facias* was put into the hands of the defendant, who was sheriff, from which it is inferred that he undertook and contracted to do what the writ commanded, viz., to make the money and have it at the next term of the court. We can see no good ground for the further inference that he undertook and contracted to make the money within a reasonable time after the writ was delivered. It may be that if he had received the money he was bound to pay it over to the plaintiff on demand; but he had not received it, and the question is, Had he contracted to make it before the return day? There is no evidence of any such contract. It is true that when the execution was

put into the hands of the defendant he was instructed to make the money as soon as he could. Where is the evidence that the defendant undertook to do anything more than what the writ commanded, or, supposing such an undertaking, where is the consideration by which it is made obligatory? If the debtor has property out of which the money could be made at the time the writ issues, and the sheriff fails to make it, he thereby takes upon himself the responsibility, and has no excuse from the fact that the debtor was afterwards unable to pay; but, apart from this responsibility, we can see no ground upon which to infer a promise or a duty to collect and pay over the amount of the execution before the return day.

PER CURIAM. *Venire de novo.*

(446)

BROWN'S HEIRS v. PATTON'S HEIRS.

Where there is no proof to establish a fact, the jury should be so instructed: and it is not the duty of the court to state to them an abstract proposition, but to state the law as applicable to the facts proved.

APPEAL from *Bailey, J.*, at Spring Term, 1852, of ASHE.

T. R. Caldwell for plaintiffs.
Burton Craig and Nat. Boyden for defendants.

NASH, J. The plaintiffs claimed the land in dispute under a grant issued in 1834 and embraced in the diagram N, M, O, P. The defendants produced no deed nor color of title, but relied upon a long possession up to known and visible boundaries, and proved by a witness that twenty-six years before the action was brought he saw three trees at A, B, and C on the diagram, marked as corner trees to land boundaries; that his father then lived at the spot marked with figure 4 and claimed those trees as boundaries of the tract of land A, B, E, F, and had enclosures about and north of his dwelling. Evidence was given by defendants of small fields being cleared and fenced in on different parts of the land claimed by them, and of their actual occupation; but as our opinion does not rest upon the length of possession of the defendants and of those under whom they claim, a more minute detail of facts relative to it is not given. His Honor instructed the jury that (447) if the defendants and those under whom they claim had actual possession of some part of the land claimed *up to well-known and visible lines and boundaries*, by enclosures on some part of the land,

for thirty-eight or even thirty years before the commencement of the suit, claiming all that time *up to well-known and visible lines and boundaries,* and exercising during this time acts of ownership up to these *well-defined lines and boundaries, etc.,* then it would be their duty to find for the defendants. The objection to the charge was, if it were right in the abstract, its inapplicability to the facts in the case and it being calculated to mislead the jury. When there is *no proof* to establish a fact relied on, the jury should be so instructed; and it is not the duty of the court to state to them an abstract proposition, but state the law as applicable to the fact proved. *Redman v. Roberts,* 23 N. C., 479; *Rowland v. Rowland,* 24 N. C., 61; *S. v. Martin,* 24 N. C., 101; *S. v. Collins,* 30 N. C., 407. In this case there was no evidence whatever of any *marked* lines around the tract of land claimed by the defendants; only three trees marked as corner trees to land boundaries were shown to exist or to have ever existed.

For this error the judgment must be reversed, and a

PER CURIAM. *Venire de novo.*

Cited: Cronly v. Murphy, 64 N. C., 490; *S. v. Chavis,* 80 N. C., 358; *Williams v. Harris,* 137 N. C., 461.

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(448)

WILLIAM D. JONES v. JOSIAH JONES.

1. To constitute a legal arrest, it is not necessary that the officer should touch the person or the individual against whom the precept has issued. It is sufficient if, being in his presence, he tells him he has such a precept against him, and the person says, "I submit to your authority," or uses language expressive of such submission.

2. But in all such and similar cases the question is whether there was or was not an intention to arrest, and so understood by the parties; and this is a matter to be left to the jury, and cannot be decided by the court alone.

APPEAL from *Manly, J.,* at Spring Term, 1846, of BUNCOMBE.

Henry and N. W. Woodfin for plaintiff.
Burgess Gaither and J. Baxter for defendant.

NASH, J. This is an action on the case for slander, in charging the plaintiff with committing the crime of perjury. The defendant relied on the plea of justification. His Honor erred "in charging the jury there had been no complete legal arrest." Whether there had been

or not, depended, in this case, upon the intention of the parties in the transaction. To constitute a legal arrest, it is not necessary that the officer should touch the person of the individual against whom the precept has issued. It is sufficient if, upon being in his presence, he tells him he has such a precept against him, and the person says, "I submit to your authority," or uses language expressive of such submission. But it is not every touching of the person that will constitute an arrest. It must be a touching with such an intent; as, for instance, an officer has a *ca. sa.* against a defendant, whom he meets in (449) company, and goes up and shakes hands with him, without apprising him that he has such a precept—this would not amount to an arrest, unless so intended and understood by the parties. So if the officer meets the defendant in a public company or on the highway, and notifies him of his having the precept, and directs him to meet him at some particular place, this might be an arrest or not, as the parties intended. Now, in the case before us, Clark, when informed by the present plaintiff that he had the precept against him, said not one word, as far as appears, nor did the officer tell him that he arrested him, or that he served the process on him, but simply informed him of the fact of having the *ca. sa.*, and directed him to come on to Brown's and arrange it. Clark did go on to Brown's, but with what intention? Again, as to Brown, when the officer got to his house, he was informed for what purpose he was there, and, upon being asked where Clark was, he replied, "he had been up to fetch him down, and that he would be there in a minute or two," and said, "I must arrest you, too," touching him on the shoulder. Brown asked to see his papers, and after an examination and discovery of a flaw in the proceedings, as both he and the plaintiff supposed, nothing more was done. Now, the latter was all one continuing transaction, and what was the intention of the parties gave character and effect to the whole. 36 Law. Lib., 111. It is no answer to say that when the plaintiff touched Brown on the shoulder as he did, that he must have intended to arrest him. That is a *petitio principii*, and the very statement of the proposition shows the error in the charge, for whenever a transaction takes its character from the intent with which it is done, it must be left to the jury, as a matter of fact, to ascertain the intent. Whether, therefore, there was an actual (450) arrest by the plaintiff of Brown and Clark ought to have been submitted to the jury.

For this error the judgment must be reversed, and a

PER CURIAM. *Venire de novo.*

Cited: Jones v. Jones, 46 N. C., 494; *Journey v. Sharpe,* 49 N. C., 167; *Lawrence v. Buxton,* 102 N. C., 132.

JAMES DICKEY v. ROBERT JOHNSON.

If the court be dissatisfied with the verdict of a jury, they can only grant a new trial. They cannot, unless by the agreement of the parties, go further, and direct the plaintiff to be nonsuited.

APPEAL from *Caldwell, J.*, at Fall Term, 1849, of LINCOLN.

Craig and Hoke for plaintiff.
H. W. Guion and Thompson for defendant.

RUFFIN, C. J. The action is assumpsit, and a verdict was rendered for the plaintiff, and the record states that the court set it aside and nonsuited the plaintiff and he appealed. The bill of exceptions sets forth evidence given on the part of the plaintiff, and states that the presiding judge directed the jury to find thereon for the (451) plaintiff, reserving the question of his right in law to recover, and that on consideration he set aside the verdict, because the plaintiff's remedy was in equity and not at law.

It is probable that the parties agreed that if the opinion of the court should be against the plaintiff, the verdict should be set aside and a nonsuit entered, with the liberty to appeal, and if such an agreement appeared, the case would stand here upon the question whether on the facts the plaintiff had or had not a right to recover. But there does not appear to have been such an agreement, and the court here does not feel at liberty to alter the record. For the want of it the judgment must be reversed, since the court, without the assent of the parties, had only the power to grant a new trial, and could not, after setting aside the verdict, go a step further and terminate the cause by a nonsuit, without the intervention of a jury.

PER CURIAM. *Venire de novo.*

Cited: *Carleton v. Byers,* 71 N. C., 334; *Hedrick v. Pratt,* 94 N. C., 104.

(452)

JOHN R. SUDDERTH v. JAMES C. SMYTH.

The probate of a deed of trust or mortgage, under the provisions of the act of Assembly, Rev. Stat., ch. 37, sec. 25, is not valid when taken by one who, though acting as deputy clerk, has not been duly appointed, nor qualified by taking the oaths to support the constitutions of the United States and of this State, and an oath of office as prescribed by the act, Rev. Stat.,

ch. 19, sec. 15. A registration, therefore, under such a probate has no effect in rendering such a deed operative, according to the provisions of the first recited act.

APPEAL from *Manly, J.*, at Spring Term, 1852, of BURKE.

J. W. Woodfin for plaintiff.
Gaither for defendant.

RUFFIN, C. J. Trover for a horse, tried on the general issue, upon the following facts agreed: Elijah Grady conveyed the horse with other things to the plaintiff on 28 May, 1850, by deed of trust to secure the payment of sundry just *debts therein* mentioned; and on the same day the deed was proved, out of termtime, by a subscribing witness before a person as deputy of the clerk of the county court, who had not been appointed and sworn in as the deputy of the clerk, but was his brother and in his absence sometimes attended for him in his office, with his assent. Upon the certificate of the probate made on the deed by the said person as deputy clerk, the deed was registered on the same day; at that time the defendant was the creditor of Grady, and on 29 May, 1850, he took a judgment before a justice of the peace and on an execution he had
(453) the horse seized and afterwards sold, and then this action was brought. The single question was whether the deed of trust was duly proved and registered, so as to make it operative against the defendant. The court held that it was not, and a verdict passed for the defendant, and plaintiff appealed from the judgment.

The act of 1829 authorizes the deputy, as well as the clerk himself, to take and certify the probate of a deed of trust for the purpose of its being registered. Were it not for that express provision the deputy could not have done so under an authority to the clerk, for that officer could no more delegate the power to administer an oath out of court than a justice of the peace could. But as the act expressly includes deputies, the question is, Who is to be taken as filling that character in our law? That is the precise point decided in *Shepherd v. Lane*, 13 N. C., 148, in which it was held that acts of agency, such as signing writs in the name of the clerk and filling them up, though subsequently recognized by the clerk as valid acts, did not constitute the agent a deputy clerk, and that a deputy is only such a person as is appointed and qualified in the mode prescribed in the act of 1777, ch. 115; that is, by taking the oaths to support the constitutions of the United States and of this State, and an oath of office. Rev. Stat., ch. 19, sec. 15. It was with this decision before the Legislature, made in June, 1829, that it was, at the next session in November, 1829, enacted that deputy clerks

might take the probate and order the registration of deeds of this kind; and it must therefore be understood to have been intended to confer the power on those only who have been constituted deputies in the formal manner prescribed by our statute, as construed by this Court, and without regard to previous rules of the common law. The registration of the deed was therefore made on a probate and fiat of a person having no power in the premises, and stands on the same (454) ground as if it had been made by the register of his own head, and without anything purporting to be a probate at all. Hence the registration, has no effect to render the deed valid from its registration as against the defendant, according to the provisions of the act of 1829.

PER CURIAM. No error.

Cited: Miller v. Miller, 89 N. C., 405; *Coltrane v. Lamb,* 109 N. C., 211; *Piland v. Taylor,* 113 N. C., 3.

DEN ON DEMISE OF SAMUEL L. KERR ET AL. v. ROBERT S. DAVIDSON.

1. In cases of usury the question of a corrupt intent must be submitted to a jury.
2. It is error in the court to assume such intent from the fact that a bond for money borrowed sets forth a larger sum than the amount actually borrowed.

APPEAL from *Settle, J.,* at Spring Term, 1851, of MECKLENBURG.

Nat. Boyden, Craig, and Wilson for plaintiff.
J. W. Osborne and H. W. Guion for defendant.

PEARSON, J. The court charged that if the jury believed the (455) testimony of Kerr as to the excess of $50, there was usury in the consideration of the deed. To this the defendant excepts. There is error, consistently with the testimony of Kerr. There may or may not have been a corrupt intent on the part of Alexander to exact usury. The question of intent ought to have been submitted to the jury, and it was error for his Honor to assume the existence of this corrupt intent from the fact that the bond sets forth a sum larger by $50 than the amount borrowed.

PER CURIAM. *Venire de novo.*

Dist.: Ray v. McMillan, 47 N. C., 229; *Bynum v. Rogers,* 49 N. C., 402.

GEORGE PLATT v. F. W. POTTS AND R. H. PENLAND.

1. Where a creditor had placed a note in the hands of an officer for collection, and another, by persuasion, induced the officer not to collect and the debtor not to pay the debt: *Held*, that the creditor had no ground for an action on the case against the other parties.

2. See the facts, as formerly reported in this same case, 33 N. C., 266, and the additional matter set forth in the opinion delivered in this court.

(456) APPEAL from *Manly, J.*, at Spring Term, 1852, of HAYWOOD.

N. W. Woodfin for plaintiff.
Henry and J. W. Woodfin for defendant.

PEARSON, J. When this case was before us at August Term, 1850, 33 N. C., 266, it was held that trover could not be maintained. Afterwards, under leave to amend, the plaintiff withdrew the declaration in trover and filed a declaration in case with two counts: *First*, that there was a corrupt combination between the defendants to defraud the plaintiff out of his debt by defeating him in its collection, and appropriating it to their own use; *second*, because the fraudulent efforts of the defendants had obscured the plaintiff's right and delayed the collection of the debt, so that, though in the meantime it might otherwise have been made fully available, it had become valueless. The judge in the court below was of opinion that the action in this new form could be maintained, if supported by the evidence. We are of a different opinion. If (as had been decided) the plaintiff cannot maintain trover, we are not able to see any ground upon which the action in its present form can be maintained. There is no doubt that the plaintiff has a good cause of action against Potts upon his undertaking to collect the note, but the plaintiff's object is to reach Penland, and the question is, Do the facts show a good cause of action? Suppose two men persuade a debtor not to make payment, and in fact forbid his doing so, has the creditor any cause of action? What hinders him from coercing payment by execution? In the case before us there is no evidence that the debtor had the money and was going to pay it, but the evidence is simply that he had property out of which the money could have (457) been made by execution. From this state of facts it is to be inferred that the debtor lent a listening ear to the defendants when they forbade his paying to the plaintiff, and was quite as attentive to the plaintiff when he forbade his paying to the defendants. But we are not able to see any ground upon which the plaintiff can make out a cause of action. It is true that the effort to prevent the debtor

from making payment was seconded by the fact that one of the defendants had possession of the paper on which the magistrate had entered his memorandum of the judgment, but we are not able to see how that can alter the case and make out a cause of action. It is also true that the defendant Penland had erased and altered this paper, so as to make it purport to be a judgment in favor of one Allen. But we are not able to see how that can make out a cause of action. It was in the power of the plaintiff to sue out a warrant upon the former judgment, and summon the defendants to produce the paper, or to prove its destruction, so as to let in secondary evidence of its contents, and thus he would have had a new judgment upon which execution could have issued and the money have been made, the persuasion and forbidding of the defendants to the contrary notwithstanding. So that if the plaintiff has sustained a loss, it is fairly attributable to his own folly. We can find no principle upon which the action can be maintained.

PER CURIAM. Error.

(458)

WILLIAM RAMSAY v. JAMES H. MORRIS.

Where in an action of warranty the only question raised is as to the proper rule respecting damages, and the jury find all the issues in favor of the defendant, the charge of the judge becomes immaterial, and, even if erroneous, cannot be reviewed.

APPEAL from *Manly, J.*, at Spring Term, 1852, of BUNCOMBE.

N. W. Woodfin for plaintiff.
Craig and J. W. Woodfin for defendant.

PEARSON, J. This was a covenant upon a warranty of the soundness of a slave. Plaintiff excepts to the charge, in reference to the damages. But the question intended to be raised is not presented, and is put out of the case and made wholly immaterial by a verdict in favor of the defendant. The charge in reference to soundness is not excepted to, and the jury find for the defendant; thereby, in effect, finding that the slave was not unsound.

This very point was decided at last term, *Gant v. Hunsucker,* 34 N. C., 254. That was covenant on a warranty of the title of a slave. Plaintiff excepted to the charge in reference to the measure of damages, but the jury found for the defendant upon the plea of *non est factum.*

and it was held this put the matter of damages out of the case. There are several cases where exceptions in reference to the statute of limitations are excluded by a verdict for the defendant upon the general issue.

PER CURIAM. No error.

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(459)

G. W. BAXTER, ADMINISTRATOR, ETC., v. B. F. HENSON.

The donee of a slave by parol is the bailee of the donor, and no length of possession, although upon a claim of property, will constitute a title to him, unless there has been a demand and refusal, or some act done in opposition to the will of the donor, changing the nature of the possession.

APPEAL from *Manly, J.*, at Spring Term, 1852, of RUTHERFORD.

Gaither for plaintiff.
J. Baxter for defendant.

RUFFIN, C. J. Charles Simmons, plaintiff's intestate, acquired by his marriage a female slave named Melinda, and some time after the marriage he and his wife agreed verbally that each of them should have and control the property they respectively had before the marriage as their separate property. In 1837 Mrs. Simmons gave, by parol, the said slave to defendant's wife, and delivered her with the knowledge of her husband; and defendant has had her in his possession ever since, claiming her as his own, and the intestate knew that the defendant so claimed her, and neither assented nor dissented. The intestate died in March, 1851, leaving his wife surviving, and the plaintiff became his administrator and demanded the said slave and her child, born in defendant's house, and, upon the refusal of the defendant to deliver them, this action of trover was brought for their
(460) conversion. Counsel for the defendant contended that his possession was adverse to the intestate, and that thereby he had acquired the title to the slaves; but the court instructed the jury to the contrary, and a verdict and judgment were given for the plaintiff, and the defendant appealed.

Since *Palmer v. Faucett*, 13 N. C., 240, it has been received as settled law that a donee of a slave by parol is the bailee of the donor, and in such a case it has been held that no length of possession will constitute a title in the bailee, though upon a claim of property by him, unless there has been a demand and refusal, or some act done in opposition

to the wish of the donor, changing the nature of the possession. *Martin v. Harbin,* 19 N. C., 504; *Green v. Harris,* 25 N. C., 210. It is thus established that the defendant was the bailee of the intestate's wife and by consequence the bailee of the intestate, for the alleged agreement between husband and wife was utterly void and did not affect their legal relation or rights. The circumstance that the wife had not capacity to make the gift, and that it was void, can make no difference. Every parol gift of a slave is void in law, yet the donee, by taking it, comes in under the donor as a bailee, and therefore cannot deny the bailor's title nor set up an adverse possession in himself.

PER CURIAM. No error.

(461)

COLBY ALEXANDER v. W. SMOOT.

Under the book-debt act, the book and oath are only evidence of small articles which have been delivered within two years; but they are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party and to disprove all of his claim, except such items as are stated in the book, upon the ground that this contains all just credits, and consequently sets forth all the amount to which the opposite party is entitled.

APPEAL from *Manly, J.,* at Spring Term, 1852, of ASHE.

Craig and Boyden for plaintiff.
T. R. Caldwell and H. C. Jones for defendant.

PEARSON, J. The defendant relied on the plea of setoff, and to prove his account produced his books and "took the book-debt oath and stated that he had given all just credits to the plaintiff, and there was nothing due to him." The only item in defendant's account sold and delivered within two years before the commencement of the action was a sheepskin, at the price of $1.12½; the other items charged to the plaintiff appeared, by the book, to be of more than two years standing.

The court charged that the jury had a right (if they believed the defendant) to take his oath and book, not only as evidence of a set-off as to the sheepskin, *but also as evidence of the true state of the account between the parties.* To this the plaintiff *excepts.* There is error. The "book-debt" act provides that if certain conditions precedent are complied with the "book and oath" shall be received as good evidence for

(462) the *small articles* so proved to be delivered within two years before action brought, but not for any article of longer standing.

Among the conditions precedent is an oath that the book contains a true account of all the dealings, and that all just credits have been given.

This is a restriction upon the right of the party to prove his account, in reference to the articles sold and delivered, by his book and oath, and cannot, by any fair construction, be made to confer an additional right, if proven by his book and oath that nothing is due to the other party, and of disproving all of his claims, except such items as are stated in the book, upon the ground that it contains all just credits, and consequently sets forth all the account to which the opposite party is indebted. How a provision in restraint of and as a condition precedent to a right can have the effect of enlarging that right it is difficult to conceive.

The idea that the book and oath are not only evidence for the several articles so proven to be delivered within two years, but is also evidence in reference to the amount of the claim due to the other party, and of the true state of the account between the parties, is evidently not expressed by the words of the act, and very clearly does not come within its meaning.

PER CURIAM. *Venire de novo.*

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(463)

J. H. SHUFORD v. JONES CLINE.

Where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the one from whom it is collected has no cause of action against the sheriff, though he claimed to be only a surety and though the plaintiff in the execution directed the sheriff to collect it from the other.

APPEAL from *Manly, J.*, at Fall Term, 1851, of CATAWBA.

Guion for plaintiff.
Craig and Boyden for defendant.

PEARSON, J. We concur in opinion with his Honor. The facts do not give the plaintiff a cause of action. He had no *legal right*, and, consequently, although he may have sustained loss by the course of conduct which the defendant saw proper to pursue, still it was "*damnum absque injuria*," for there can be no injury unless the party has a right.

Plaintiff's ground of complaint is that he put into the hands of the defendant, who was sheriff, an execution against the plaintiff and one Able and Eli Shuford, and directed him to make the whole sum out of certain property of the said Able, who was the principal debtor; that although the property was fully sufficient, the defendant omitted to make out of it the whole sum set forth in the execution, and after selling a part, permitted the rest of the property to be appropriated and applied to the payment of the other debts of the said Able, by reason whereof the plaintiff was afterwards compelled to pay the balance of the execution. (464)

This shows that the plaintiff has sustained a loss by the conduct of the defendant, but his misfortune is that he had no right to control the defendant, who was responsible alone to the creditor in the execution, and was at liberty to make the money out of any one of the three debtors named in the writ, notwithstanding the directions of the plaintiff to the contrary. We can, therefore, see no ground upon which the plaintiff can make out a cause of action; and, in fact, upon principle it is clear that he has no cause of action, for he had no right, and the defendant was not bound to notice the allegation of his being a surety. He had a right to go by the writ, in which no distinction was made. How far, under the act of the General Assembly, Rev. Stat., ch. 31, sec. 131, provided its provisions are attended to, sureties may acquire rights, so as to have a cause of action if a sheriff violates these, is not now before us.

PER CURIAM. Affirmed.

Cited: Gatewood v. Burns, 99 N. C., 360.

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(465)

WILLIAM JOHNSTON v. MICHAEL FRANCIS.

The true meaning and import of the act, Rev. Stat., ch. 31, secs. 40, 42, that if the jury shall find a less sum than $60 to be due to the plaintiff he shall not be nonsuited, if he shall show by affidavit that the sum for which the suit is brought is really due, "but that for want of proof or that the time limited for the recovery of any article bars a recovery," or that for some other cause of the like kind the verdict was for so small a sum, so as to show that the suit was commenced in the Superior Court in good faith and not for the purpose of evading the operation of the act—the verdict being held to be only *prima facie* evidence of an intent to make such evasion, as, in this case, where the plaintiff fairly thought he was entitled to interest, but the jury would not allow it.

APPEAL from *Battle, J.*, at Fall Term, 1851, of HAYWOOD.

Henry for plaintiff.
Gaither and Baxter for defendant.

PEARSON, J. The Revised Statutes, ch. 31, sec. 40, provides that no suit shall be commenced in the Superior Courts for a demand of less value than $60 due by open account. Section 42 provides that if any person shall demand a greater sum than is due, *on purpose to evade the operation of this act*, and the jury shall find a sum less than $60, principal and *interest*, the court shall nonsuit the plaintiff, unless an affidavit is made that the sum for which the suit is brought is really due, "but that for want of proof and that the time limited for the recovery of any article bars a recovery," then and in that case there shall be judgment. This section is incomplete, and is even hardly expressed;
(466) but the substance of it is that a verdict for a less sum shall be taken as *prima facie* evidence of an intent to evade the operation of the act, unless the implication is rebutted by an affidavit that the sum really due is over the amount of $60, and that the verdict for a less sum was, in consequence of a want of proof or the exclusion of certain items by the statute of limitations, or for some other cause of the like kind, so as to show that the suit was commenced in the Superior Court in good faith, and not on purpose to evade the operation of the act. The words of the act specify but two cases—where there is a want of proof and when the statute of limitations bars; but it is clear from the whole act that the object of section 42 was to prevent evasions, and that, by its true meaning and import, it embraces not merely the two cases specified, but all cases of a like kind, when the plaintiff honestly expected to recover a larger sum, and by affidavit accounts for the fact of there being a verdict for a less sum, so as to make it consistent with the idea that there was no attempt at evasion. For instance, suppose the claim of the plaintiff is reduced to a less sum by a set-off, the case is not within the words, but is within the meaning; the amount of the plaintiff's demand made it necessary for him to proceed by writ and not by warrant, and it was not for him to know whether the defendant would avail himself of the set-off; his doing so accounts for the recovery of a less sum, and rebuts the implication of an intent to evade. So when the plaintiff honestly believes, upon reasonable grounds, that he is entitled to interest, which brings his case within the jurisdiction, but the jury do not allow interest, the matter is sufficiently explained, and the implication of an intent to evade is rebutted; for it was necessary to proceed by writ in order to recover interest, inasmuch as a single justice could not give judgment for an amount over $60, although he might consider that the

plaintiff was entitled to interest, Rev. Stat., ch. 72, sec. 6, allows (467) a single justice in the case of bonds, etc., to give judgment, although, by reason of interest, the amount exceeds $100, but there is no similar provision in regard to open accounts, etc.

In the present case the plaintiff swears that he believed he was entitled to interest. Was this belief based on reasonable ground? This is established by the fact that his Honor (without exception) "charged the jury that they might allow interest if they thought proper," and it may be that but for "the want of proof" or regard to the usage between the plaintiff and his customers, or in regard to a direct understanding between the plaintiff and defendant as to interest after the expiration of the year, it would have been the duty of his Honor to have made a more specific charge in reference to the plaintiff's right to interest. There is no error.

PER CURIAM. No error.

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(468)

GUILFORD EAVES v. ROBERT G. TWITTY.

A declaration in deceit for the sale of an unsound negro, alleging the unsoundness to have proceeded from drunkenness, is not supported by evidence showing merely that the negro had a propensity to get drunk and a habit of intemperance. The unsoundness must be shown to have existed before the sale.

APPEAL from *Battle, J.*, at Fall Term, 1851, of RUTHERFORD.

J. Baxter and G. W. Baxter for plaintiff.
Bynum and Shipp for defendant.

NASH, J. There is no error that we can perceive in the charge of the judge below. In the case as brought before us, the gist of plaintiff's complaint is the unsoundness of the negro, Bob, at the time of the sale, and the fraudulent concealment of it by the defendant, and, throughout the argument here his right to damages has been placed on the same ground. The attention of his Honor below appears to have been confined to the same points. The jury were accordingly instructed that to entitle the plaintiff to recover he must show to their satisfaction that at the time of the sale he was unsound in mind or body, and that such unsoundness might proceed from a habit of drunkenness as well as from any other cause, but that a mere propensity to drink would not be in law sufficient to constitute unsoundness, unless this had been produced by it at the

time he was sold. It is true, both here and in the court below, it was argued that Bob had acquired such a *habit* of intemperance as (469) materially impaired his value. But a habit is not, in itself, unsoundness, though it unquestionably may produce it, and the declaration was for unsoundness; and it is also true that a fraud may as well be practiced by the vendor in concealing the habit of the animal sold as in any other way. If, for instance, a horse is wanted for the harness, and one is sold with a knowledge of the seller of the use to which he is to be applied, and he conceals the fact of his being vicious in harness, or represents him as gentle, there can be no doubt that, in either case, he is guilty of a fraud, for which an action in deceit lies.

This is not the case before us. The declaration is for unsoundness of mind produced by intemperance, and the judge in his charge properly confined himself to it.

PER CURIAM. No error.

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(470)

WILLIAM H. SIMPSON v. WILLIAM HIATT.

1. Although a *venditioni exponas* is not a part of the record, so as to carry absolute verity with it, yet it is the authority under which an officer acts and his only authority to sell, and is therefore a necessary part of the evidence to support the title of a purchaser at a sale under such an execution.

2. So the return of a sheriff on such *venditioni*, being an official act, is also competent evidence.

3. In this case the evidence, as in the case of the sheriff's deed, is only *prima facie*, and may be rebutted by other evidence.

4. Although a plaintiff who obtains a judgment in an attachment levied on land may have taken judgment against the garnishees, he still has a right to have the land sold under the levy and the order founded thereon.

5. If a sheriff levies an execution upon land when there is sufficient personal property to satisfy the debt, any injury inflicted is a matter between the sheriff and the owner of the property, the defendant in the execution.

APPEAL from *Ellis, J.*, at Special Term in June, 1851, of MECKLENBURG.

Craig, Alexander, and Wilson for plaintiff.
Boyden, Osborne, and Hutchinson for defendant.

NASH, J. We concur with his Honor both in the reception of the testimony objected to and in his charge. The lessor of the plaintiff and the defendant both claimed the premises in dispute, under Allen Cheyne, who was a citizen of Georgia and resident there. Allen Cheyne claimed to be a devisee under the will of his father, Henry Cheyne, and, being largely indebted to the estate, the executors (471) took out an attachment against him and caused it to be levied upon the land in question, and other property, and such proceedings were had that a regular judgment was obtained against the defendant, Allen Cheyne, at November Term, 1847, of Union County Court; and at same term one Williams and Milton Ching, who had been summoned as garnishees, upon the examination confessed that each was indebted to Allen Cheyne, and the debts were condemned to the satisfaction of plaintiff's debts, and judgments were rendered against each of them to the amounts severally admitted to be due. These garnishees were solvent, and are still so. A *venditioni exponas* issued; and at the sale the lessor of the plaintiff, it is alleged, became the purchaser, and to show that fact he offered in evidence the *venditioni exponas* and the sheriff's return thereon. This was objected to by the defendant, upon the ground that the *venditioni exponas* and the sheriff's return constituted no part of the record and were not admissible as evidence to establish the sale by the sheriff and the purchase by the lessor. The objection was overruled, and the testimony admitted by the court as proof that the execution was in the hands of the sheriff at the time of the sale, that there was a sale by him, and that the lessor of the plaintiff was the purchaser at such sale.

Defendant claimed the land under a deed from Allen Cheyne, bearing date April, 1847, before the attachment issued, and it was contended by the lessor of the plaintiff that it was made to defraud the creditors of Allen Cheyne, and therefore void. On the part of the defendant it was insisted that the plaintiff could not recover, for that a sum sufficient to pay the debt in the attachment had been condemned in the hands of the garnishees, and that the plaintiffs in the attachment, of whom the lessor of the plaintiff in this case was one, could not sell the land in controversy until he had collected the sums so (472) condemned or showed that he could not collect them. The objection was overruled by the court, and the jury were instructed that if the deed from Allen Cheyne to the defendant was made to defraud his creditors, it was void, and the plaintiff was entitled to a verdict. The objection of the defendant to the *venditioni* and the sheriff's return is twofold: *first,* that is was no part of the record; and *secondly,* that the return was but the certificate of the sheriff of what he had done under the precept.

It is certain that the *venditioni* is not a part of the record, so as to carry absolute verity with it; but it was the authority under which the officer acted, and his only authority to sell. It was, therefore, a necessary part of the evidence in making out the plaintiff's title, and for the purpose for which his Honor admitted it, it was clearly competent; as to their return on the *venditioni*, it is an official act, rendered necessary by the law, which compels the sheriff to make *due* return of every precept which comes to his hands, and this return is a notification to the court of what the officer has done under the precept. It is not conclusive evidence, being not a judicial but a ministerial act, so neither is the conveyance by the sheriff to the purchaser. In both cases the opposing party may show that no sale did take place, or that the land specified in the deed was not levied on or sold. But they are both *prima facie* evidence and stand effective until rebutted. This position is sustained by *Smith v. Low*, 27 N. C., 197, and *Patterson v. Britt*, 33 N. C., 389.

The second objection urged by the defendant is equally untenable. The plaintiff in the *venditioni exponas*, so far as the defendant is concerned, had a right to have the land sold under it, although he had judgments against the garnishees at the time. This objection is founded on the general principle that a debtor's personal property is first to be made subject to an execution. It is unnecessary to investigate that doctrine here; for we hold that if an injury has been inflicted (473) by a sheriff's departing from this order, it is a matter between him and the owner of the property, the defendant in the execution. *Mordecai v. Parker*, 14 N. C., 435. In this case the jury have found that the conveyance from Allen Cheyne to the defendant was made to defraud his creditors. It is, therefore, void as to the latter, and, as far as they are concerned, conveyed no title to the defendant, but left it still in Cheyne, who is no party in this suit.

PER CURIAM. No error.

Cited: Simpson v. Hiatt, post, 474; *Walters v. Moore*, 90 N. C., 49; *Miller v. Powers*, 117 N. C., 220; *Comrs. v. Spencer*, 174 N. C., 37.

R. SIMPSON v. W. HIATT.

The sheriff's return upon an execution is *prima facie* evidence of a sale, and as to who was the purchaser.

APPEAL from *Battle, J.*, at Spring Term, 1851, of MECKLENBURG.

Alexander, Craig, and Wilson for plaintiff.
Boyden, Osborne, and Hutchinson for defendant.

NASH, J. We are not called on to put any construction upon (474) the will of Henry Cheyne. Believing, as we do, that his Honor erred in his opinion upon another point, we are constrained to say that there must be a *venire de novo.* Setting apart, then, the question as to the devise, this case presents the same question as to the competence of the sheriff's return upon the *venditioni exponas* as arose in *Simpson v. Hiatt, ante,* 470. The facts, so far as that question arises, are the same. In this case his Honor decided that there was *no* evidence of the sale by the sheriff. In this there is error. The sheriff's return upon the execution is *prima facie* evidence of a sale, and that the plaintiff was the purchaser. For the reasons governing our opinion, we refer to the case of *Hiatt,* cited above, and the cases there referred to.

PER CURIAM. *Venire de novo.*

(475)

G. W. MELTON v. W. F. MCKESSON.

1. A guardian can only hire out the slave of his ward until the latter comes of age.

2. Upon coming of age, the ward has a right to take the slave out of the possession of the person who has hired him from the guardian for a longer period.

APPEAL from *Manly, J.,* at Spring Term, 1852, of BURKE.

Avery for plaintiff.
Gaither for defendant.

PEARSON, J. A guardian, on 1 January, hired out a negro, belonging to his ward, for the year. The ward arrived at age on the 29th of that month; and the single question is, Had the ward a right, after arriving at age, to take the negro from the possession of the hirer?

The question, as it seems to us, scarcely admits of debate. A guardian is appointed to act for the infant until he arrives at full age. At that time the appointment expires and the party is presumed to be then capable of acting for himself. Upon what principle can a guardian overreach his time so as to bind the ward? We can see none.

Land cannot be rented out except for a term long enough to put in and mature a crop. Hence the statute, which makes it the duty of

guardians to rent out the land and hire out the negroes of wards, from abundance of caution, has an express proviso that no guardian shall let or farm out land belonging to any orphan for a longer term than the orphan be of age. Rev. Stat., ch. 54, sec. 15.

(476) Negroes may be hired for a month or a week or by the day. The guardian knows when his ward will arrive at full age. Hence it was not conceived to be necessary, *ex abundante cautela,* to say to him, "You shall not hire a negro for a longer time than the orphan be of age!"

Put a case: A ward will arrive at age in May; his land has been rented out for the year before. The small grain is taken off in June and July; the corn in October and November. The doctrine of emblements, by which he who sows shall reap, does not apply. Now, must the guardian rent out the land for a time long enough to put in and mature a crop, and thereby overreach his own time, or must he let the land lie idle and unproductive until May? To relieve him from all doubt, the statute has an express proviso—let it lie "idle" rather than overreach your time. But in reference to negroes the guardian is not put in any such predicament! True, a negro may hire for a better price if hired for the whole year; but still he need not be idle and unproductive, for he can be hired for a month or a week or a day.

There is error.

PER CURIAM. *Venire de novo.*

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(477)

JAMES SMITH *v.* MARSHALL CALLOWAY.

The act of Assembly of 1850, ch. 3, authorizing an appeal by one defendant, where there are more than one, does not apply to appeals taken before that act went into operation.

APPEAL from *Manly, J.,* at Fall Term, 1851, of ASHE.

Mitchell for plaintiff.
T. R. Caldwell for defendant.

NASH, J. Under the act of 1777, granting appeals from an inferior to a superior tribunal, it has long been settled that an appeal moved the whole case, and the trial in the appellate court was *de novo.* As a corrollary from this principle it has been settled that from a joint judgment against several parties all must join in the appeal. At their session in 1850 the Legislature passed an act to extend the right of appeal, where-

by it is enacted, where two or more persons are defendants in any action at law before a justice of the peace or in the county or Superior courts, either one or more of them may appeal. Ire. Dig. Man., page 7; stat. of 1850, ch. 3. The warrant in this case issued 23 July, 1849, against *Marshall Calloway* and *Roderick Murchison,* and judgment was rendered by a single magistrate against them jointly on 27 August following. From this judgment Calloway alone appealed. At June Term, 1850, of the court of Ashe, where the case pended, a motion was made on the part of the plaintiff to dismiss the case for the reason that only one of the defendants had appealed, which, being refused, the case was submitted to the jury and upon their verdict judgment was (478) rendered for the defendant, and the plaintiff appealed, both from the decision of the court on the motion to dismiss and from the judgment. In the Superior Court the case was dismissed, upon the ground that the defendant Calloway could not appeal alone, and a *procedendo* ordered to the magistrate who granted the appeal.

On the part of the defendant it was contended that under the act of 1850 the appeal was properly granted to the defendant Calloway. That act has no bearing whatever on the case. The judgment appealed from and the appeal taken were granted before its passage. The appeal, therefore, was improvidently granted by the magistrate. If there was any power in the Legislature to give efficiency to an appeal under such circumstances, there is nothing in the act showing that such was their intention. There are no words giving it a retrospective action.

There is no error in the opinion of the judge of the Superior Court, and the judgment is

PER CURIAM. Affirmed.

(479)

HAIRSTON v. STINSON.

Where contiguous tracts of land are conveyed and held by one deed as one tract, they are to be taken as one tract, though they lie in different counties and are separated by a river; and, therefore, the owner is bound to list such lands as one tract in the county in which he resides.

APPEAL from *Bailey, J.,* at Spring Term, 1852, of DAVIE.

No counsel for plaintiff.
Craig for defendant.

NASH, J. We see no cause to disturb the judgment in this case. The counties of Davie and Davidson lie contiguous to each other, sep-

arated by the river Yadkin. The late Jesse Pearson owned several tracts of land in the former, and several in the latter, lying on opposite sides of the river and separated only by it. He sold the whole of these lands to Peter Hairston by one conveyance, who by his will devised them to the plaintiff as one whole. At that time the latter lived in Virginia and employed several overseers, the one on that portion of the land in Davie County and the other on that which laid in Davidson; and the land was listed in the respective counties. Subsequently the plaintiff removed into this State and settled on the portion which was in Davie, and listed the whole as one tract in that county. The sheriff of David-

son demanded a double tax upon the land in that county, as
(480) land not given in for taxation, and, upon a refusal to pay it, levied upon the horse in question, the property of the plaintiff, and sold it.

It is admitted that if the land was properly listed in Davie, the sale of the horse was illegal, and the plaintiff is entitled in this action to recover its value. Upon an examination of the act of the Assembly, it is manifest that the plaintiff was not only entitled to give it in the county of Davie, but that it was his duty to do so. By section 24 of the act of 1836, ch. 102, the inhabitants of the respective districts of each county are required to return on oath each and every tract of land for which they are liable to pay a tax in the county. When, therefore, an individual owns in the same county several distinct tracts of land separate from each other by several and distinct titles, he must give them in separately; but if he holds the whole by one title, they constitute but one tract, if they be contiguous to each other, and may so be given in, because they are held by him under one title and as one whole. Section 31 of the same statute is decisive of the question presented in this case. It is provided that when a tract of land shall be in two or more counties, the owner shall be *bound* to list the same in the county where he resides, if he resides in either county; if he resides in neither, then he may list it in either. Jesse Pearson held the land under different titles, and, in his possession, if not contiguous, they were different tracts, and as such he was bound to list them. But he sold them to Mr. Hairston by one deed, and by the latter they are devised as one. Ordinarily not more than one tract is conveyed in the same deed, for, if the vendor acquired the estate by several contiguous parcels, when united in him and sold together, they are usually surveyed together and described as a single tract. Hence the purchaser in possession of any part of the land conveyed by that deed is said to be in possession of the whole. *Carson v. Burnet,* 18 N. C., 556. While the plaintiff lived in Virginia he

acted rightly in listing the land in the several counties in
(481) which they lay. After his removal to Davie, the law imposed

it as a duty upon him to list the whole in that county. The fact that the river Yadkin ran through the land, thereby dividing the parts which lie in the two counties, is of no importance. The two parts were still contiguous, the filum of the stream being the line.

We see no error in the judge's charge, and the judgment is

PER CURIAM. Affirmed.

Cited: Cedar Works v. Shepard, 181 N. C., 17.

DEN ON DEM. OF NORTH CAROLINA TO THE USE OF A. G. HUNSUCKER v. SAMUEL V. TIPTON.

The owner of a tract of land, purchased at the Cherokee sales, is estopped to deny the right of one who has bought at a sale under an execution against him, though such purchaser at the Cherokee sales has not yet paid the State, and therefore has acquired no legal title.

APPEAL from *Battle, J.*, at Fall Term, 1851, of CHEROKEE.

J. Baxter and Gaither for plaintiff. (482)
J. W. Woodfin and N. W. Woodfin for defendant.

PEARSON, J. The lessor of the plaintiff produced a judgment and execution and the sheriff's deed to him as the best bidder. The defendant, who was a debtor in the execution and was in possession of the land, put his defense on the ground that he held under a contract or certificate of purchase of Cherokee land, the title to which was not to be made *until paid* for, and that, inasmuch as he had no title, therefore he should be allowed to remain on and cultivate the land as belonging to the State.

The rule that a defendant in an execution is not allowed to dispute the title of the purchaser at sheriff's sale is well settled, and although there may at times be a case of hardship, still as a general rule it has had a wholesome effect and tends greatly to discourage litigation, and to enhance the value of land sold under execution, by having it known that one whose land has been sold by the sheriff has no right to continue in possession and dispute with the purchaser about title, provided the judgment and execution are in due form. We can see no sufficient ground for making an exception to the general rule in the present case. *Jordan v. Marsh,* 31 N. C., 234, has no application, for there the

defendant had acquired a new possession under the paramount title of a prior purchaser at sheriff's sale. *Deaver v. Parker,* 37 N. C., 40, in which it is held that a purchaser of Cherokee land who has not paid the State has no such interest as can be sold under an execution so as to confer on the purchaser at sheriff's sale a right to call for the legal title, without having made payment to the State, and when in truth the State was paid by the defendant in the execution after the sale by the sheriff does not affect the principle that, where a debtor is in (483) possession of land, a purchaser of his interest at sheriff's sale has no right to take his place and to be let into possession, without any dispute as to title. Accordingly, in *Davis v. Evans,* 27 N. C., 525, it was held that a purchaser of an equity of redemption, as against the mortgagor in possession, had a right to recover in ejectment, although the legal title was in the mortgagee, upon the ground that the debtor in the execution was estopped and, being in possession, was bound to give up the possession to the purchaser, and could not be heard to dispute upon the question of title.

PER CURIAM. *Venire de novo.*

HENRY MASON v. WILLIAM BALLEW, ADMINISTRATOR OF W. BALLEW.

A *scire facias* to recover a penalty imposed on a sheriff for not returning process cannot upon his death be revived against his representatives.

APPEAL from *Manly, J.,* at Fall Term, 1851, of CATAWBA.

(484) *Craig for plaintiff.*
H. W. Guion for defendant.

RUFFIN, C. J. The sheriff of Caldwell was amerced in the sum of $100 for not making due return of a writ of *fieri facias* at the instance of the plaintiff against one Miller, and a *scire facias* was served on him to show cause against it at the next term, and was served on him. Before the return of the *scire facias* the sheriff died, and then a *scire facias* to revive that proceeding was issued against his executor; and, upon being thus brought in, the executor insisted that the right of action did not survive, and that the plaintiff could not have judgment against him. The court was of that opinion, and refused to make the judgment absolute and awarded an execution for the amercement, and the plaintiff appealed.

The sum claimed in this proceeding is called, in the act, a penalty of $100, forfeited by not returning the process (Rev. Stat., ch. 99, sec. 18) but it is clear that it does not come within section 10 of the act to prevent abatement of suits (Rev. Stat., ch. 2), nor any other provision, saving rights of action after the death of one of the parties.

PER CURIAM. Affirmed.

Cited: *Wallace v. McPherson*, 139 N. C., 298.

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(485)

JAMES LUSH v. ANDREW McDANIEL.

1. The declarations of a sick person, at any particular time, of his sufferings and condition are evidence so far as they refer to the time at which they are made; but declarations of such persons as to their state and condition at any preceding period are not admissible.
2. Physicians alone are permitted to give their opinion as to the existence, nature, or extent of disease in any person.
3. Where it is alleged that a slave was unsound at the time of her sale, in consequence of her then having the venereal disease, evidence of physicians is competent to show that the disease did not at that time prevail in the neighborhood in which she was sold, but did prevail in the town, about 75 miles distant, to which she was taken by the purchaser soon after the sale.

APPEAL from *Bailey, J.*, at Special Term, February, 1850, of BUNCOMBE.

J. Baxter and N. W. Woodfin for plaintiff.
Gaither for defendant.

RUFFIN, C. J. This is an action on a convenant of soundness in a bill of sale of a female slave, alleging as a breach that at the time of the sale she had syphilis and afterwards died of the disease. The defendant and the slave resided in Macon County and the sale was made there on 22 March, 1849. She was then brought by the plaintiff to his residence at Asheville, a distance of 75 miles, and died there the next August.

The plaintiff offered a witness, who was not a physician, to prove that in the spring of 1849 the slave told him in Asheville that she

(486) then had the disease, and also that she had it before the plaintiff purchased. But, on objection, the court refused to admit the evidence.

The plaintiff then offered another witness, who was not a physician, to prove that soon after the plaintiff's purchase he examined the woman at Asheville, and that he was of opinion she then had the disease. But, on objection, the court also refused to admit the evidence. Then the plaintiff called physicians who attended the woman in the latter part of her life, and they deposed that she died of syphilis, which had reached its secondary stage, and produced ulcers in the throat, and in their opinion might have existed for several weeks and probably for two or three months; that while attending her, in answer to their inquiries, the woman stated her symptoms as to her pains, and their locality, and they were satisfied as to the nature of the disease, and that it produced her death. The plaintiff offered further to prove by them that she also told them that she had been so diseased and laboring under the same symptoms before the sale to the plaintiff. But, on objection, the court refused to admit the last evidence. The defendant then offered to prove by the physicians that, during the spring and summer of 1849, they found in their practice that syphilis was prevalent in Asheville, and the court, after objection, admitted the evidence. The defendant offered as witnesses two physicians who resided near the defendant in Macon County, and they stated that they had repeatedly known the disease to prevail there, but they had no recollection of any case at or about the time the slave was carried from there. This evidence was objected to by the plaintiff, but was admitted by the court. The jury found a verdict for the defendant, and the plaintiff appealed from the judgment.

The opinions of persons who are not physicians were not competent. In general, witnesses must speak to facts, and not to be heard
(487) as to their opinions. As an exception it is established that persons practicing a profession or exercising a trade may deliver their opinions to the jury as evidence on questions of science or art belonging to their vocation. The effort of the plaintiff is to make the exception take the place of the general rule, but it must fail. The declarations of the woman as to her sufferings and condition at any particular time are also evidence of her state at the time she made them. It is natural evidence upon those points, as her appearance, seeming agony of body, and other physicial exhibitions would be. *Roulhac v. White,* 31 N. C., 63; *Biles v. Holmes,* 33 N. C., 16. The ground of receiving those declarations is that they are reasonable and natural evidence of the true situation and feelings of the person for the time being. But, in reference to the past periods, they have no such claim to confidence,

as they are manifestly to that purpose but the narrative of one not on oath. The physicians might probably give their opinion, and did give it, how long she had been infected with this malady, because their opinion would be founded on the known progress of the disease to its different stages at various periods, and the appearance of the patient during the course of their attendance. But the account given by her as to previous symptoms and their origin and duration would not influence the mind of the physician upon the question, as one of science, but would be acted on by him only in proportion to the belief of its truth, either from his confidence in the narrator or from its coincidence with his judgment on that point, formed from the existing stage of the malady.

The narration, therefore, was clearly improper to be submitted to the jury as tending to establish that her condition at the time to which the narrative refers was in fact such as she subsequently described it. Though extremely slight evidence that the woman had not (488) contracted her disease before the sale, and did so afterwards, yet it was evidence having that tendency, that the disease was not known by the practitioners of medicine in the part of the country where she was sold to have existed there about that period, and was known by the gentlemen of the same profession to have existed about the place to which she was carried. From the nature of the malady and the usual mode of contracting it, and the physical propensities and common moral feelings and habits of persons in the condition of this woman, the evidence afforded some aid to the jury in establishing the probable period when she became infected.

PER CURIAM. No error.

Cited: Bell v. Morrisett, 51 N. C., 179; *S. v. Harris,* 63 N. C., 6; *Sherill v. Tel. Co.,* 117 N. C., 363; *Howard v. Wright,* 173 N. C., 343.

(489)

DEN ON DEMISE OF WILSON v. HALL AND WILSON.

1. An action of ejectment does not abate by the death of the lessor of the plaintiff.

2. If the lessor, who dies, be tenant for life, judgment may be rendered, though the court may refuse to amend a writ of possession thereon.

3. Where the estate is continued in heirs, judgment is to be rendered as if the lessor were alive; and a writ of possession may also be delivered,

though that is to be done under the directions and control of the court as to the persons entitled to be put in by the sheriff.

4. Where the defendants are a part of the heirs of the deceased lessor, the proceedings under the judgment and execution should be accordingly modified by not putting the defendants out of possession, but by putting in the other heirs with them.

APPEAL from *Manly, J.*, at Spring Term, 1852, of MACON.

J. Baxter and Henry for plaintiff.
N. W. Woodfin and J. W. Woodfin for defendants.

RUFFIN, C. J. The lessor of the plaintiff had eight children, two of whom claimed the premises against him, and let them to the defendants, who entered, and then this suit was brought. After issue joined, and before the trial, the lessor of the plaintiff died intestate. A verdict was taken for the plaintiff, subject to the opinion of the court whether on these facts the plaintiff was entitled to judgment or ought to be nonsuited. The court gave judgment on the verdict for the plaintiff, and the defendants appealed.

The judgment must be affirmed. The death of the lessor of the plaintiff does not abate an ejectment, and consequently, if he had the right of entry at the date of the demise and the commencement of (490) the suit, the plaintiff is entitled to a verdict and judgment. Adams Eject., 320. Even if the lessor of the plaintiff be tenant for his life, and defending the action, there must be judgment for the plaintiff in respect of the trespass and ejectment, for which the defendant is liable in damages, as well as in respect of the costs, although the court might refuse to award a writ of possession thereon. Adams Eject., 34; *Jackson v. Davenport*, 18 John., 302. Much more is that true when the estate of the lessor continues and descends to his heirs. Then the judgment is to be rendered as if the lessor were alive, and possession may also be delivered, though that is to be done under the direction and control of the court as to the persons entitled to be put in by the sheriff. If the defendants were, therefore, strangers to the lessor, there would be a clear propriety in putting in the heirs under the writ of possession, and to that end turning out the defendants. As the defendants here represent two out of eight of the lessor's heirs, in whom the premises are now vested, the proceedings under the judgment and execution should be accordingly modified by not putting the defendants out of possession, but by putting in the other heirs with them, just as would be done on a general verdict and judgment in ejectment by some tenants in common against others. The judgment

and execution executed are in this case proper as well to enable those who are out to be let into possession of their undivided shares as to enable them to aid the administrator of the father to recover *mesne* profits.

PER CURIAM. No error.

Cited: Blount v. Wright, 60 N. C., 90; *Edwards v. Phillips,* 91 N. C., 359.

(491)

STATE v. A. B. WEAVER.

1. Where a genuine instrument is altered, so as to give it a different effect, the forgery may be specially alleged, as constituted by the alterations, or the forgery of the entire instrument may be charged.
2. An indictment for forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelt as they appear spelt in the original.
3. The decision of the judge below as to the question what the instrument contains, to be decided by inspection, cannot be reviewed in this court.
4. Whether a witness who has been examined shall be reëxamined is a question of discretion for the judge below, and from his decision no appeal lies.

APPEAL from *Manly, J.,* at Spring Term, 1852, of BUNCOMBE.

Attorney-General for the State.
N. W. Woodfin and Bynum for defendant.

RUFFIN, C. J. The defendant was indicted for forging a certain bond, of which the tenor is given, as follows:

By 15 November next I promise to pay John Carter fifteen dollars, as witness my hand and seal, this 24 September, 1839.

ALX'R BRADLEY. [L. S.]

with the intent to fraud one Alexander Bradley. On the trial, the instrument was produced and evidence given that Alexander Bradley executed it, as a bond bearing date 24 September, 1838, and that he afterwards made a payment on it and took Carter's receipt therefor, expressed in part of his bond, describing it therein as bearing date 24 September, 1838, and that the prisoner, for the purpose of (492) defeating the operation of the receipt as evidence of a payment on the bond given by Bradley, altered the date from 1838 to 1839.

Counsel for the prisoner objected that the instrument produced varied from that set forth in the indictment because its date was not 1839, but was still 1838. But the date appearing to the court, on inspection, to be 1839, the objection was overruled and the instrument was submitted to the jury. Counsel further insisted that the evidence of the alteration did not support the charge of forging the whole instrument. But the court held the contrary, and so informed the jury. Counsel further objected that there was a variance in the manner of writing the name of Bradley in different parts of the bill, which was fatal. But the court was of a contrary opinion. During the argument before the jury the difference of opinion arose between the solicitor and the counsel for the prisoner as to a part of the testimony of one of the witnesses, and the silicitor proposed to recall the witness, that he might state for himself what he had said. But the court would not allow the witness to be recalled, but referred the question to the recollection of the jury.

The prisoner was convicted, sentence passed, and he appealed to this Court.

There is no error. The last point was directed to the discretion of the presiding judge, as he might suppose a further examination of the witness needful or not to the proper understanding of the testimony. So whether the paper produced purported to be dated in 1838 or 1839 is not a question of law, subject to review in this court, but was purely a matter of fact, apparent on the face of the paper, and therefore his

(493) Honor was to determine how the fact was; and as his eyes were as good as ours, and he had the instrument before him and we have not, his determination is properly conclusive.

There is no doubt that when a genuine instrument is altered, so as to give it a different effect, the forgery may be specially alleged, as constituted by the alterations, or the forgery of the entire instrument may be charged. As altered, it is a forgery for the whole. 2 East P. C., 986-988.

The indictment could not properly have set out the name of Alexander Bradley different from what it does. The man's name appears to be "Alexander," and therefore it is so given, when describing the person intended to be defrauded. He did not, however, sign it in full to the bond, but wrote "Alex'r," and the indictment points it spelt in this latter manner, where it sets out the instrument forged, since it was necessary to set it out according to its tenor.

PER CURIAM. No error.

Cited: Fain v. Edwards, 44 N. C., 68; *S. v. Noblett*, 47 N. C., 425; *Morehead v. Brown*, 51 N. C., 371.

(494)

STATE v. ALOM PRESLEY.

It is error in a judge to tell a jury, in his charge, that from the testimony of A. B., the prosecutor, and from the nature of his testimony otherwise, it was *not possible* for the witness innocently to be in error; it was, therefore, a question of guilt on the one hand, or corrupt false swearing on the other.

APPEAL from *Battle, J.*, at Fall Term, 1851, of UNION.

Attorney-General for the State.
No counsel for defendant.

NASH, J. His Honor, in charging the jury, entirely overlooked *S. v. Thomas,* 29 N. C., 381. That was an action upon a sheriff's bond, and the plaintiff made out a *prima facie* case. The defendant introduced a witness by the name of Clayton, who, if believed, established a full defense. The presiding judge instructed the jury that the statement of Clayton was such as precluded the idea of a mistake; and, if false, it must be within his knowledge, and that the jury must believe he had committed perjury before they could find a verdict for the plaintiff. This court decided that his Honor erred, upon the ground that the credit which was to be given to the witness was a matter of fact to be ascertained by the jury, and not one of law. In this case we think his Honor has committed the same mistake. The jury was instructed that, from the testimony of Brown, the prosecutor, and from the nature of his testimony otherwise, it was *not possible* for the witness innocently to be in error; it was, therefore, a question of guilt (495) on the one hand or corrupt false swearing on the other. The word perjury is not used by the court, but a good definition of it was. In his concluding remarks all doubt as to the meaning of the court is removed. The jury were informed that "it was necessary to the defendant's acquittal to conclude that the prosecutor's testimony was false, and, if false, *it must be corruptly so,* supposing the events to have happened in the ordinary course and the senses of the witness to be sound." Now, this was taking from the jury the most important inquiry committed to them—the degree of credit to be given to the prosecutor. If they believed him, the defendant was guilty. The charge in this case is substantially the same with that in the case of *Thomas.* The only difference is that in this the jury are informed that the only thing that could save the witness Brown from the crime of perjury, if his statement was false, was that his mind was unsound. That he might have been mistaken was certainly possible; but his Honor did

not suffer the jury to make this inquiry. We think his Honor erred, and there must be a

PER CURIAM. *Venire de novo.*

Cited: Critcher v. Hodges, 68 N. C., 23; *Withers v. Lane*, 144 N. C., 190; *Speed v. Perry*, 167 N. C., 127; *S. v. Rogers*, 173 N. C., 758.

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(496)

M. W. KINCAID v. JAMES C. SMYTH.

Where one, against whom a *fi. fa.* has issued, pays the amount to the plaintiff in the execution, the sheriff, who did not levy the execution before the return day, whereby it became *functus officio* and was not in law in his hands at the time of the payment, is not entitled to recover commissions from the defendant in the execution, without an express promise to pay them.

APPEAL from *Battle, J.*, at Fall Term, 1851, of BURKE.

Bynum for plaintiff.
Gaither for defendant.

NASH, J. By section 21, chapter 105, Laws 1836, it is enacted that the sheriff be allowed for all money collected by him by virtue of any levy, 2½ per cent, and the like commission for all money that may be paid the plaintiff by the defendant while such execution is in the hands of such sheriff. This fee bill was made up from a variety of acts passed from 1784 to 1830. An exposition of this act in part was made in *Siler v. Blake*, 20 N. C., 90, where the court declare that the Legislature did not mean to give a sheriff commissions on a debt, though he has an execution in his hands, unless it were one by which the payment of the money could be coerced by him. This decision was a departure from the letter of the act, but we think it was clearly within the meaning. In this case a judgment had been rendered in the Superior Court of Burke in behalf of the heirs of one Greenlee against
(497) the present defendant; an execution had issued, and was placed in the hands of the plaintiff, who was then sheriff of Burke. We are not informed when the *fi. fa.* came into his possession. While it was so in his hands the defendant Smyth complained that the sheriff was troubling him about it, and it is admitted that Smyth had property, both real and personal, more than sufficient to pay it off; but the execu-

tion was never levied. The plaintiff in this case was present when Smyth paid the money due on the execution to the plaintiff in it, which was after the return day. We think his Honor erred in ruling that the plaintiff was entitled to recover of the defendant his commissions. The law declares that it be the duty of the sheriff to execute all process which comes to his hands with all convenient speed, or as soon after it comes to his hands as the nature of the case will admit. *Lindsay v. Armfield* 10 N. C., 548. If an officer has a *ca. sa.* against the body of an individual, and comes where he is and when he is at liberty to execute it, and does not, he is guilty of a breach of duty if the party escapes so that the process cannot be served upon him. So if the precept be a *capias ad respondendum*, and it is not executed by the officer when he may, he is answerable in damages to the party aggrieved if the defendant escapes. And this upon the principle that he has been guilty of a breach of duty. In this case it was the duty of Kincaid, the sheriff, to have levied his execution and thereby secured his commissions. If he choose to favor Smyth by not levying the process, he must abide the consequences. The law approves of a humane and benevolent execution of its precepts, but it does not reward an officer for a neglect of duty. The case does not show any agreement on the part of Smyth to pay the sheriff his commissions, whatever might have been their private understanding. We conclude, then, that although the defendant Smyth paid the money to the plaintiff in the execution, yet as the (498) precept had not been levied, and was *functus officio* at the time of the payment, and not in law in his hands for execution, the plaintiff cannot recover commissions from the defendant without an express promise to pay. We do not see that a levy was not made through any fraudulent conduct of the defendant.

PER CURIAM. *Venire de novo.*

Cited: Willard v. Satchwell, 70 N. C., 270.

DEN ON DEMISE OF FREEMAN v. HEATH AND LOFTIS.

A lessee cannot deny his lessor's title until he is discharged from the estoppel, arising out of his lease and possession, by yielding up possession to his lessor. His acceptance of a lease from another and acknowledgment of possession under him will not discharge the estoppel. He may be equally estopped as to each.

FREEMAN *v.* HEATH.

APPEAL from *Manly, J.*, at Spring Term, 1852, of HENDERSON.

(499) *N. W. Woodfin for plaintiff.*
J. Baxter for defendant.

RUFFIN, C. J. Heath was the tenant in possession of the premises, and the declaration was served on him, and Loftis was admitted without objection to defend with him, and thus entered into the general rule and pleaded not guilty. The plaintiff gave in evidence a grant for the premises to one Reed in 1797, and then gave further in evidence a lease in writing from the lessor of the plaintiff, dated November, 1845, whereby the premises were let to Heath for the year 1846, on a rent of $3 and certain repairs, and then gave evidence that Heath was in possession through the year 1846, and up to the bringing of this action in March, 1849. The defendant then offered in evidence a grant from the State for the premises, made in 1828 to two persons who afterwards conveyed to John Baxter in fee; and that prior to 1845 Baxter leased them to Heath in writing for a rent of 50 cents for each year Heath should occupy, and that Heath entered and was occupying under Baxter when he accepted the lease for 1846 from Freeman. The defendant also offered to prove that in 1847 Baxter brought an ejectment against Heath for the premises, and that Heath did not appear therein, and judgment was taken against the casual ejector, and a writ of possession issued thereon and was delivered to the sheriff, who attended with Baxter on the premises for the purpose of executing it, but did not execute it, because Heath submitted to Baxter as being in possession, and then accepted from him another lease in writing for the premises, dated 6 September, 1847, at a rent of 50 cents, and obliging him to surrender possession to Baxter, his heirs or assigns, on request, and that afterwards Baxter conveyed to Loftis. To the defendant's evidence counsel (500) for plaintiff objected, on the ground that the defendant was estopped to deny the title of his lessor, Freeman; but the court overruled the objection and received the evidence, and upon it instructed the jury to find for the defendant. From a verdict and judgment accordingly the plaintiff appealed.

There were several questions made at the time, but as that upon the question of estoppel is decidedly for the plaintiff, no other need be considered. The general rule is that a lessee cannot deny his lessor's title until he is discharged from the estoppel arising out of his lease and possession, by yielding up the possession to his lessor. *Smart v. Smith*, 13 N. C., 258. He cannot enable himself to resist his landlord by merely leaving the premises, and then, before the landlord gets in, going back into possession under some other claim of title; for that is plainly

incompatible with the lessor's right to have back the possession from the tenant which the latter engaged to restore. The great principle, indeed, is not disputed by the defendant, but is contended that the particular circumstances here of the prior lease by Baxter and his recovery in ejectment, and Heath's acceptance of another lease from him, made this an exception, within *Jordan v. Marsh*, 31 N. C., 234. That, however, is not so considered by the Court. The case cited turned on its particular circumstances, which were very special, as mentioned in the subsequent case of *Lyerly v. Wheeler*, 33 N. C., 288; *Grandy v. Bailey, ante*, 221, in the latter of which that case is particularly explained. There are marked differences between it and the present. In an action by a purchaser under execution against the defendant, the latter is only restrained from denying that he had some title, while a lessee is obliged not only not to deny his lessor's title, but also to surrender (501) the possession to him when required, after the expiration of the lease. Besides these, the defendant in the execution excepted a lease from the probable purchaser, who in fact had the title; whereas, here neither Freeman nor Baxter had the title, but it was in Reed or those claiming under him, with whom neither of those parties showed any connection, each of them claiming against Heath merely upon the estoppel arising out of the several leases he accepted from them respectively, and the estoppel, as between him and one of them, was not impaired by that between him and the other, he being equally estopped as to each. *Grandy v. Bailey, supra.* The only way in which Baxter could have got rid of the effect of the estoppel to Freeman was to have turned Heath out actually, so that his own possession or that of another tenant would not have been derived from Freeman, nor connected with one that was so derived. As long as Freeman can bring his action against Heath, as the person in possession, he can insist upon the estoppel on him as his lessee.

PER CURIAM. *Venire de novo.*

Cited: Gilliam v. Moore, 44 N. C., 98; *Pate v. Turner*, 94 N. C., 55; *Bonds v. Smith*, 106 N. C., 563.

(502)

STATE v. GEORGE HERMAN.

1. A child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law, and where the mother was visibly pregnant at the marriage, it is a presumption *juris et de jure* that the child was the offspring of the husband.

2. Where the examining justices do not find whether a child, alleged to be a bastard, was born in wedlock or not, that being a question before them, nor find whether, if born in wedlock, the facts existed which would still render it a bastard, as *nonaccess* or impotency of the man who was married to the woman, at the time when she had the child, there is sufficient ground for quashing the proceedings.

3. So, also, if they pass upon these facts, or the testimony of the mother alone, for as to them she is an incompetent witness.

APPEAL from *Manly, J.*, at Fall Term, 1851, of ALEXANDER.

Attorney-General for the State.
W. P. Caldwell for defendant.

RUFFIN, C. J. The defendant was charged as the father of a bastard child of Polly Payne. The warrant does not state whether she was a single or married woman, but in her examination she swore that she had been delivered of a bastard child, and that the defendant was the father of the child; and further, that at the time the child was begotten she was a single woman, but that she has since married one Robert Payne—without stating whether the child was born before or after her marriage. Two justices, upon the examination of the woman, bound the defendant to the county court, and there he moved to quash the warrant and orders thereon, upon the ground that the child (503) was not a bastard, but was born in wedlock and legitimate. In support of the motion the defendant gave evidence that the child was born in May, five months and two days after the marriage of the mother to Robert Payne, and that for more than twelve months preceding their marriage the said Robert Payne and Polly resided in the same county in this State, and that "in the fall," before the marriage, the said Robert and Polly stayed all night at the same house. The court, therefore, allowed the motion, and the attorney for the State appealed. In the Superior Court the order on the same state of facts was reversed, and the defendant appealed to this Court.

The Court is of opinion that the order ought to have been quashed. A child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law. Co. Litt., 244 a. And where a child is born during wedlock, of which the mother was visibly pregnant at the marriage, it is a presumption *juris et de jure* that it was the offspring of the husband. 1 Phil. Ev., 463. Best on Presumption, 70. In *Rex v. Luff*, 8 East 193, *Mr. Justice Lawrence* gives for the rule a good reason, that a man who marries a woman whom he knows to be in this situation is to be considered as acknowledging, by a most solemn act, that the child is his. But over and above that

there is a legal presumption here that the child was actually begotten by the husband. If the parties had been married at the time of the conception, it would be undoubtedly so, for they lived near each other and were together about the time the child was begotten, and the rule seems now settled that where there was opportunity for sexual intercourse between a man and his wife, it is presumed that it did take place, unless the contrary be shown; and if the intercourse might have occurred at a time when, by a course of nature, he might have been the father, the child is deemed his. *Morris v. Davis,* 3 Car. Payne, 215, 378. If the case, therefore, were to turn on the (504) question of the actual paternity, upon the evidence given, without any denial of the husband's access or suggestion of his impotency, it would be decided for the defendant; and there seems to be no difference in point of law between a case where the conception was prior or posterior to the marriage, provided the birth be after wedlock, for that makes the legitimacy. But in the case under consideration the court never properly reached that point. For the magistrates do not even find the fact that the child was born in wedlock, much less do they find the other facts necessary to establish the legal conclusion that the child, though born in wedlock, was a bastard; that is to say, the nonaccess or impotency of the man who was married to the woman when she had the child. Those facts the woman was not competent to prove (*Luff's case, supra,* and *S. v. Wilson,* 32 N. C., 131), and she was the only witness examined. If after she proved the adultery with the defendant, another witness had professed to prove those facts, the judgment of the justices thereon would be conclusive as to the truth of the matters thus proved, and neither upon motion or *certiorari* could their order be quashed. But it is perfectly certain that the justices could not have passed upon those questions, or, if they did, they proceeded on incompetent evidence—that of the wife alone—and, therefore, as soon as it appeared that the child was born in wedlock, the case against the defendant was at an end, for the present at least, for the want of legal evidence that the child was a bastard and could be chargeable to the defendant, which is always the first inquiry in such a case.

The judgment of the Superior Court must be reversed and that of the county court affirmed.

PER CURIAM. Reversed.

Cited: Johnson v. Chapman, 45 N. C., 218; *S. v. Allison,* 61 N. C., 347; *West v. Redmond,* 171 N. C., 743.

(505)

STATE v. SAMUEL G. BOYDEN.

1. If seems though an assault with intent to murder was formerly considered a felony, it is now held to be a misdemeanor only; and although it may be a high misdemeanor, it is not subject to any additional punishment, but only such as in the discretion of the court may be inflicted for other misdemeanors at common law.

2. Where a person had been forbidden a house by the owner, but visits it at the invitation of a servant, at an hour when he may expect to meet the owner, for the purpose of having music; when, instead of bringing his violin, he comes armed with a deadly instrument, a six revolving pistol; when, upon being ordered out by the owner, he asked the latter to go with him, and, this being refused, he stopped at the door and made an assault by presenting his pistol—this, if death had ensued, would have been murder, and, therefore, even according to the old authorities, he might well be convicted of an assault with intent to murder.

APPEAL from *Manly, J.*, at Fall Term, 1851, of ROWAN.

Attorney-General for the State.
Burton Craig for defendant.

RUFFIN, C. J. The indictment is for an assault and battery on Joseph A. Worth, and contains two counts, one of which is said to have been with the intent to kill and murder. The evidence was that several persons—Archibald Honeycut was one—formed a partnership for gold mining at a place called Gold Hill, and that Honeycut was the managing partner, and occupied a small house on the premises belonging to the company, which was called the office, in which he slept and kept the books, papers and gold and other valuables belonging to the
(506) concern. In September, 1851, Worth purchased the interest of Honeycut and of some of the other partners and by the appointment of most of the company Worth afterwards became the manager instead of Honeycut, and took possession of the office, books, etc., and at the same time requested Honeycut to assist him in the management; and he agreed to do so, and by Worth's permission he kept his bed and clothing in the office, as he had done before, and there Worth did the business of the company. There had been some difference between Worth and Boyden, and, at the request of the former, Honeycut told the latter, in the early part of the day of 11 November, 1851, that Worth wished him not to come to the office, at the same time saying that he, Honeycut, had no objection to his coming, and inviting him to come that night; to which Boyden replied that he would, and bring his fiddle along and have a tune. Boyden, however, went to the office in the

afternoon, before the business hours closed, and without his fiddle, and at 5 o'clock Worth went to the office to weigh and enter the company's gold for the day. Upon entering and seeing Boyden there with Honeycut, Worth ordered him to leave; and Boyden said he would do so if Honeycut said so, and also that he would leave if Worth would go with him. The statement of Worth was that when he ordered Boyden to leave the house he stated his reason to be that he had circulated false reports against him, and that Boyden rose from a seat near the fire and went towards the door, which was 6 or 8 feet from Worth, walking backwards and keeping his face towards Worth, and, while he was so retreating, the language before mentioned and other angry words passed between them. That upon Boyden's reaching the door, in reply to something, Worth called him a liar, and Boyden retorted that Worth was a damned liar, and at the same time Boyden drew a pistol from his coat pocket, of the Colt's revolver kind, and presented it at Worth, (507) and that he, Worth, discovered that the instrument was a pistol, and as he believed his life in danger, and he had no way for retreat, he made a spring towards Boyden and struck him a blow with his fist, which knocked Boyden around and he fell out of the door upon the piazza, and almost instantaneously the pistol was fired, and the ball passed very near him, Worth, and that he then pressed on Boyden, who continued to present the pistol, and bursted three caps, and fired twice more at the witness, but only one ball hit him, and that wounded his finger. Honeycut stated on this part of the case that after the lie had been given on both sides, and Boyden had got to the door, he saw Worth advance, but did not look at Boyden at that time, and did not know whether he drew the pistol before Worth had moved; that the blow from Worth preceded the report of the pistol, and that Boyden was knocked down from the door to the porch, and that then he, the witness, heard the firings of the pistol.

Some objections were made to the admission of the deed under which title was set up to the premises by Worth and the company, for defects in the probate and registration. But it is not necessary to set them out, as the matter is deemed wholly immaterial, since the company and Worth, as manager, were in the peaceful occupation of the house in which the affray occurred, according to the evidence and finding of the jury. The court charged the jury that if they believed that Worth, as managing partner of the company, occupied the office for the purpose of the business of the company, and that Honeycut remained there under Worth and by his permission, for the purpose of assisting him, then the possession of the house was in the company or Worth, and that Worth had a right to order Boyden out of the house, even if he had been invited there by Honeycutt, and Boyden was bound to go out; and that

(508) if Boyden, when he got to the door of the room, presented the pistol at Worth with the intention to shoot him, and Worth, on seeing that, apprehended that his life was in danger, then Worth was justified in giving Boyden a blow, as the means of preventing great bodily injury to himself; and that if Boyden, when he thus presented the pistol to fire and kill Worth, and afterwards, upon receiving the blow from Worth, fired with the same intent, they ought to find the defendant guilty of the assault with the intent to kill and murder, though he actually only wounded Worth's finger; but that if he did not intend to kill, he ought to be found guilty only of the other count. The defendant was convicted on both counts, and after a sentence of fine and imprisonment he appealed to this court.

Honeycut had no interest or possession of his own in the house, but was either the guest or servant merely of Worth, in whom as manager or one of the company the possession was. *S. v. Curtis*, 18 N. C., 222. There can be no doubt, therefore, that the defendant was guilty of an assault upon stopping at the door, when ordered out, and presenting his loaded pistol within 8 feet of the prosecutor. The only question, therefore, was whether that act of his and those subsequent constitute an assault with intent to murder or not. It may be premised that such an assault, though it seems to have been once considered as a felony, is now held to be a misdemeanor only; and although it may be a high misdemeanor, it is not subject to any additional punishment, but only such as, in the discretion of the court, may be inflicted for other misdemeanors at common law. It is not, therefore, seen how it is material to lay the intent to murder, or why, if laid, it does not fall among the *alia enormia* common in pleadings. It is found, however, to have been considered otherwise in former times. The books of precedents give indictments with counts laying the assault both ways, and in *Rex v. Milton*, 1 East Pl. C., 411, it was held that the party could not (509) be convicted on a count at common law for any assault with intent to murder, upon evidence showing that it would be but manslaughter if death occurred. In that state of the authorities the Court will not proceed upon a mere impression to the contrary, but assume them to be correct, until at least further investigation. Such an investigation is not requisite at present, because most clearly, upon this evidence, which the jury finds to be true, the killing, if it had happened, would not have been manslaughter, but murder of a wanton character and apparently premeditated. The defendant had been forbidden the house by the proprietor, and yet, at the invitation of a servant, he engaged to visit it at night for the purpose of having music. But instead of going then, he went at an earlier period, when he might expect to meet the owner of the house, and instead of

taking his violin he came secretly and disgracefully armed with a most deadly instrument, a pistol shooting six times, and, upon being ordered out, asked the other party to go with him, and, upon his not doing so, stopped at the door and made an assault by presenting the pistol. If he had then shot the man it could be nothing less than murder of a most aggravated kind. The blow then given to him does not change the character of the killing, if it had happened during the rencounter that followed, for the blow was given by one exposed to a deadly assault, as the means of saving himself from imminent peril of his life, and the killing would have been the act of the first aggressor, the first assailant, and the wrongdoer throughout. Therefore, supposing it necessary to show that a killing would have been murder, in order to support this count, the Court holds that the defendant was properly convicted on it, and that it is accordingly proper that the sentence should be carried into execution.

PER CURIAM. No error.

Cited: S. v. Stephens, 170 N. C., 746.

ERRATA—Add to "Cited Cases," on page 387, at end of *S. v. Floyd: White v. Hines,* 182 N. C., 288.

LIST OF LAWYERS IN NORTH CAROLINA 1852

Those not marked are practicing lawyers.
Those marked thus * have retired from practice.
Those marked thus † are on the Bench.

ALAMANCE

Holt, Samuel L., Graham
Lancaster, J. W., Graham
Mebane Giles, Mason Hall
†Ruffin, Thomas, Graham
Ruffin, William K., Graham

ALEXANDER

Bogle, Alexander M., Taylorsville

ANSON

Ashe, Thomas S., Wadesboro
Dargan, Atlas J., Wadesboro
Hargrave, Johnson R., Wadesboro
Little, Alexander, Wadesboro
Nelms, Ebenezer, Wadesboro
*Smith, Alexander B., Wadesboro
Winston, Patrick H., Wadesboro

ASHE

McMillan, Franklin B., Gap Civil
*Murchison, Roderick, Jefferson
Neal, Quincy F., Jefferson

BEAUFORT

Brown, Sylvester T., Washington
*Clark, Henry S., Leechville
Clark, William, Washington
*Demill, William E., Washington
*Dimock, Henry, Washington
Donnell, Richard S., Washington
Hawks, John S., Washington
Joiner, James, Washington
Latham, John, Washington
Rodman, William B., Washington
Satterthwaite, Fenner B., Washington
Shaw, Matthew, Washington
Sparrow, Thomas, Washington
Stanly, Edward, Washington
Stubbs, Jesse R., Washington
Warren, E. J., Washington
Woodard, Augustus, Washington
*Woodward, Isaiah, Durham's Creek Mills

BERTIE

*Cherry, Josh B., The Oaks
Gilliam, Henry A., Windsor
Hardy, Henry B., Windsor
Outlaw, David A., Windsor
Spruill, Samuel B., Colerain
*Thompson, Lewis, Hotel
Tyler, William C., Roxobel
Winston, Patrick Henry, Windsor
Wortham, George P., Windsor

BLADEN

Brown, Thomas Owen, Westbrooks
McDugald, John Gillespie, Elizabethtown
*McKay, James J., Elizabethtown
Richardson, John A., Elizabethtown
*Wright, Issac, Elizabethtown

BRUNSWICK

(No resident lawyers)

BUNCOMBE

Chandler, George W., Asheville
Coleman, N., Asheville
Erwin, M., Asheville
Henry, R. M., Asheville
Roberts, Joshua, Asheville

NOTE.—Beginning with 63 N. C., January Term, 1867, the list of those to whom license to practice law was issued at each term has been printed in the Reports, but there is no record of those to whom license was granted prior to that date, except in 1854-5, in 46 N. C. Thinking it may be of interest to the profession, this list of all the lawyers practicing in North Carolina in 1852 is inserted here. ANNOTATOR.

Roberts, P. W., Asheville
Williams, William, Asheville
Woodfin, J. W., Asheville
Woodfin, N. W., Asheville

BURKE

Avery W. W., Morganton
Caldwell, T. R., Morganton
Gaither, B. S., Morganton
Jones, E. P., Morganton
Tate, W. L., Morganton
Tate, W. S. C., Morganton
Wilson, T. W., Morganton

CABARRUS

Barringer, Rufus, Concord
Barringer, Victor C., Concord
Coleman, Daniel, Concord
Coleman & Scott, Concord
Long, David F., Concord
Long, John M., Concord
Love, Robert S., Concord
McRee, Ephraim F. D., Concord
Scott, Joseph W., Concord

CALDWELL

*Jones, Edmund W., Lenoir
Lenoir, W. W., Lenoir
Williamson, A. C., Lenoir

CAMDEN

Ferebee, D. D., South Mills
Hamilton, Zerah, Camden C. H.

CARTERET

Thomas, C. Randolph, Beaufort

CASWELL

Anderson, Albert G., Anderson's
Fuller, James N., Yanceyville
Graves, Calvin, Locust Hill
Graves, John A., Yanceyville
Hill, Samuel P., Yanceyville
McGehee, Montfort, Milton
Kerr, John, Yanceyville
Palmer, Nathaniel J., Milton

CATAWBA

McCorkle, Matthew L., Newton

CHATHAM

Clegg, John T., Pittsboro
Cook, William, Pittsboro
Headen, James H., Pittsboro
Haughton, John H., Pittsboro
Houze, Benjamin J., Haywood
Jackson, John J., Pittsboro
*Jackson, Samuel S., Pittsboro
Smith, Sidney, Pittsboro
Toomer, John D., Pittsboro
Waddell, Maurice Q., Pittsboro

CHEROKEE

Axley, Felix, Murphy
Davidson, Allen T., Murphy
Henry, Robert, Murphy
Rolen, John, Murphy

CHOWAN

Benbury, John A., Edenton
Bruer, George W., Edenton
Haughton, Tipoo S., Edenton
Heath & Hanes, Edenton
Heath, Robert R., Edenton
Hines, Elias C., Edenton
*Hoskins, Thomas S., Edenton
Hunter, William C., Edenton
Johnson, Lucius J., Edenton
Leary, Thomas H. Jr., Edenton
Manning, Thomas C., Edenton
Paine, Robert T., Edenton
*Satterfield, Geo. W. B., Edenton
*Skinner, Joseph B., Edenton

CLEVELAND

Burton, Aug. W., Shelby
Cabaniss, Harvey DeK., Shelby

COLUMBUS

George Forney, Whiteville
Maultsby, John A., Whiteville

CRAVEN

Attmore, George S., New Bern
Bryan, James W., New Bern
Clark, Charles C., New Bern
†Donnell, John R., New Bern
Green, George, New Bern
Hubbard, Albert G., New Bern

Jones, Henry Clay, New Bern
McLin, Henry, New Bern
†Manly, Marthias E., New Bern
*Singleton, Thomas S., New Bern
*Stanly, James G., New Bern
Stevenson, George S., New Bern
Washington, John N., New Bern
Washington, Wm. H., New Bern

CUMBERLAND

Baker, Joseph, Jr., Fayetteville
Banks, James, Fayetteville
Buxton, Ralph P., Fayetteville
Dobbin, James C., Fayetteville
*Eccles, John D., Fayetteville
Haigh, William H., Fayetteville
Huske, Walter A., Fayetteville
Patterson, Peter, Fayetteville
†Potter, Henry, Fayetteville
Shepherd, Jesse G., Fayetteville
Smith, Arch. A. T., Fayetteville
Spears, John A., Fayetteville
Strange, Robert, Fayetteville
Warden, Jesse T., Fayetteville
*Williams, John C., Fayetteville
Winslow, John, Fayetteville
Winslow, Warren, Fayetteville
Wright, Clement G., Fayetteville
Wright, William B., Fayetteville

CURRITUCK

Baxter, Burwell M., Currituck

DAVIDSON

Bradshaw, J. A., Lexington
Foster, A. G., Lexington
Leach, J. M., Lexington
Long, J. A., Lexington
*Wiggins, W. R., Lexington

DAVIE

Clement, John M., Mocksville
Fleming, N. O., Mocksville
Lillington, John A., Mocksville
Miller, G. A. Mocksville

DUPLIN

Bryan, Robert K., Kenansville
*Graham, Stephen, Kenansville
Hill, William E., Kenansville
Reid, David, Kenansville
*Rhodes, Joseph T., Faison's Depot

EDGECOMBE

Bridgers, John L., Tarboro
Bridgers, Robert R., Tarboro
*Clark, Henry T., Tarboro
Dancy, William F., Tarboro
Lewis, K. H., Tarboro
Norfleet, William, Tarboro
Pender, Lorenzo D., Tarboro

FRANKLIN

Arendell, W. Mck. B., Louisburg
*Johnson, Samuel, Louisburg
Lankford, Menalius, Louisburg
Lewis, Augustus M., Louisburg
*Person, Jesse, Louisburg
Spivey, David W., Louisburg
Stone, De Witt Clinton, Louisburg
Thomas, Thomas Knibb, Louisburg

FORSYTH

*Sheppard, Augustine H., Salem
Shober, Charles E., Salem
Starbuck, Darius H., Salem
Wharton, Rufus W., Salem
Wilson, Thomas J., Salem

GASTON

Gaston, Larkin B., Dallas

GATES

Baker, William J., Gatesville
*Gordon, George B., Gatesville
Riddick, Willis F., Gatesville

GRANVILLE

Amis, James S., Abrams Plains
Davis, Joseph J., Oxford
Edwards, Leonidas C., Oxford
Gilliam, Robert B., Oxford
Henderson, Archibald E., Williamsborough
*Hicks, Edward H., Oxford
Lanier, Marcellus V., Oxford
Lassiter, Robert W., Oxford
Littlejohn, James T., Oxford
*Taylor, John C., Oxford

Venable, Abraham W., Brownsville
*Venable, Samuel L., Oxford
Venable, Thomas B., Oxford

GREENE

Forbes, Richard N., Snow Hill

GUILFORD

Albright, Thomas C., Greensboro
Armfield, Robert F., Greensboro
†Dick, John M., Greensboro
Dick, Robert P., Greensboro
Gilmer, John A., Greensboro
Gorrell, Ralph, Greensboro
McLean, James R., Greensboro
Mendenhall, Cyrus P., Greensboro
Mendenhall, George C., Jamestown
Mendenhall, James R., Jamestown
Mendenhall, William P., Jamestown
Morehead, James T., Greensboro
*Morehead, John M., Greensboro
Scott, James G., Greensboro
Scott, Levi M., Greensboro
Walker, William R., Greensboro

HALIFAX

Batchelor, Joseph B., Heathsville
Conigland, Edward, Halifax
Daniel, John N., Halifax
*Devereux, Thomas P., Heathsville
Edmunds, William H., Westland
McWilliams, Fred N., Heathsville
Pope, William B., Halifax
Simmons, B. F., Halifax
Whitaker, Speir, Enfield

HAYWOOD

Fitzgerald, John Asa Beall, Waynesville
*Francis, Michael, Waynesville

HENDERSON

Baxter, John, Hendersonville
Bryson, William, Hendersonville
*Gulick, John C., Hendersonville
Jordan, Joseph P., Hendersonville

HERTFORD

Smith, W. N. H., Murfreesboro
*Spiers, B. T., Murfreesboro
Valentine, William D., Harrellsville
Yancey, A. P., Murfreesboro

HYDE

Beckwith, Nathaniel, Middleton

IREDELL

Caldwell, Joseph P., Statesville
Caldwell, Walter P., Statesville
*Davidson, George F., Mount Mourn
Mellon, John F. A., Mount Mourn
Sharpe, Leander Q., Statesville

JOHNSTON

Evans, Joseph W., Smithfield

JONES

(No resident lawyers)

LENOIR

*Bond, Henry F., Kinston
Strong, William A., Kinston
Wooten, John F., Kinston

LINCOLN

Brevard, Alexander F., Lincolnton
*Burton, Alfred, Beatties Ford
Bynum, William P., Beatties Ford
Guion, Benjamin S., Lincolnton
Hoke, John F., Lincolnton
Lander, William, Lincolnton
McBee, Vardry A., Lincolnton
*Shipp, Bartlett, Beatties Ford
Slade, Thomas T., Lincolnton
*Sumner, Benj., Sr., Lincolnton
Thompson, Leonard E., Lincolnton
Williamson, William, Lincolton

McDOWELL

Davis, Champion, N. T., Marion
DeBerniere, J. Mallet, Marion
Erwin, Adolphus, Marion

MACON

Siler, David Wimer, Franklin

MARTIN

Biggs, Asa, Williamston
Carraway, Joseph G., Williamston

Clements, George R., Williamston
Eborn, William C., Hamilton
Ellison, William J., Williamston
*Mizell, William L., Williamston

MECKLENBURG

Alexander, Nathaniel W., Charlotte
Alexander, William J., Charlotte
Black, William, Charlotte
Caldwell, G. W. Charlotte
Davidson, E. C., Charlotte
Davidson, W. F., Charlotte
Davidson, W. L., Charlotte
Davis, Stephen W., Charlotte
Fox, Junius A., Charlotte
Grier, E. C., Charlotte
*Henderson, Philo P., Charlotte
Hutchinson, S. Nye, Charlotte
Johnston, William, Charlotte
Jones, E. P., Charlotte
Lowrie, S. Jack, Charlotte
Myers, W. R., Charlotte
Osborne, James W., Charlotte
*Strange, W. F., Charlotte
Waring, R. P., Charlotte
Wilson, Joseph H., Charlotte

MONTGOMERY

Gaines, James L., Swift Island

MOORE

Kelly, Angus R., Carthage
Murchinson, Kenneth B., Watson's Bridge
Person, Samuel J., Carthage

NASH

*Arrington, Archibald H., Hilliardston
Arrington, Thomas M., Nashville
Singeltary, George E. B., Nashville

NEW HANOVER

Baker, Daniel B., Wilmington
Burr, Talcott, Jr., Wilmington
Cantwell, Edward, Wilmington
Davis, George, Wilmington
Empie, Adam, Jr., Wilmington
Hall, Eli W., Wilmington
Hill, William, Wilmington
Holmes, H. L., Wilmington
Holmes, John L., Wilmington
London, Mauger, Wilmington
McRae, D. K., Wilmington
McRee, Griffith J., Wilmington
Meares, Oliver P., Wilmington
*Meares, Gaston, Wilmington
Meares, Thomas D., Wilmington
Miller, Thomas C., Wilmington
Smith, Moody B., Wilmington
Strange, Robert, Jr., Wilmington
*Walker, Thomas D., Wilmington
Wright, Joshua G., Wilmington
Wright, William A., Wilmington

NORTHAMPTON

Barnes, David A., Jackson
Bragg, Thomas, Jackson
Bynum, John B., Jackson
Calvert, Samuel J., Jackson
†Moore, Ballard, Green Plains
Randolph, John, Jackson
Wilkins, Edmond, Gaston

ONSLOW

(No resident lawyers)

ORANGE

Ashe, Richard J., Chapel Hill
Bailey, John L., Hillsboro
†Battle, William H., Chapel Hill
William A. Graham, Hillsboro
Jones, Cadwallader, Hillsboro
Jones, George W., Red Mountain
*Macnair, Edmund D., Hillsboro
†Nash, Frederick, Hillsboro
Nash, Henry K., Hillsboro
Norwood, Hasell, Hillsboro
Norwood, John W., Hillsboro
Phillips, Samuel F., Chapel Hill
*Swain, Davis L., Chapel Hill
Turner, Josiah, Jr., Hillsboro
Waddell, Francis N., Hillsboro
Waddell, Hugh, Hillsboro
Webb, Thomas, Hillsboro

PASQUOTANK

Black, John, Elizabeth City
Brooks, George W., Elizabeth City
*Creecy, R. B. Elizabeth City
Ehringhaus, J. C. B., Elizabeth City

Martin, William F., Elizabeth City
Pool, John, Elizabeth City
*Pool, Joseph H., Elizabeth City
*Shepard, W. B., Elizabeth City

PERQUIMANS

Albertson, Jonathan W., Hertford
Cannon, Joseph S., Hertford
Jones, Thomas F., Hertford
Jordan, John P., Hertford
Smith, Edward F., Hertford
Townsend, Joseph W., Hertford

PERSON

Reade, E. G., Roxboro
Winstead, C. S., Roxboro

PITT

*Lewis, Richard H., Falkland
Yellowley, Edward C., Greenville

RANDOLPH

Brooks, Josiah H., Asheboro
Brown, Reuben H., Asheboro
Drake, James M. A., Asheboro
*Elliott, Henry B., Cedar Falls
Johnston, D. W. C., Eden
Long, William J., Long's Mills
Worth, Jonathan, Asheboro

RICHMOND

Cameron, John W., Rockingham
Dockery, Isaac, Dockery's Store
*Leak, Walter F., Rockingham
Peacock, William M., Rockingham
Wetmore, G. Badger, Rockingham

ROBESON

French, Robert S., Lumberton
*Gilchrist, John, Gilopolis
McLean, Alexander, Randallsville
McLean, Neill A., Lumberton
McNeill, William, Lumberton
Morisey, Thomas J., Lumberton
Troy, Robert E., Lumberton

ROCKINGHAM COUNTY

Aiken, B. W., Madison
Carter, William F., Eagle Falls
Courts, Daniel W., Rawlingsburg
Dillard, John H., Wentworth
*Galloway, Thos. S., Eagle Falls
*Little, Thomas, Reidsville
Reid, David S., Reidsville
Ruffin, Thomas, Jr., Wentworth
Watt, Robert B., Lawsonville

ROWAN

Blackmer, Luke, Salisbury
Boyden, Nathaniel, Salisbury
Caldwell, Archibald H., Salisbury
†Caldwell, David F., Salisbury
Craig, Burton, Salisbury
†Ellis, John W., Salisbury
Jones, Hamilton C., Salisbury
Kerr, James E., Salisbury

RUTHERFORD

Baxter, G. W., Rutherfordton
Bynum, John Gray, Rutherfordton
*Carson, J. McDowell, Rutherfordton
McFadden, John, Rutherfordton
Shipp, William M., Rutherfordton
Wilson, Franklin I., Rutherfordton

SAMPSON

Carr, Louis F., Owensville
Faison, Solomon J., Spring Vale
Holmes, Thomas H., Clinton
Johnson, Josiah, Clinton
McKoy, Almond, Clinton
Murphy, Patrick, Taylor's Bridge
Slocumb, William K., Clinton
Williams, Stephen, Spring Vale

STANLY

McCorkle, James M., Albemarle

STOKES

Davis, Jasper W., Germanton
Joyce, Andrew, Francisco
Poindexter, John F., Germanton
*Ruffin, Archibald R., Germanton
Starbuck, J. H., Salem

SURRY

Allison, Richard M., Mount Airy
Brooks, George W., Mount Airy

Cloud, John M., Mount Airy
Dobson, Joseph, Mount Airy
*Graves, Solomon, Mount Airy

TYRRELL

Stubbs, Jesse R., Columbia

UNION

Walkup, Samuel H., Monroe

WAKE

Badger, George E., Raleigh
Battle, C. C., Raleigh
*Bledsoe, M. A., Raleigh
Branch, L., Raleigh
Bryan, John H., Raleigh
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*Cameron, Duncan, Raleigh
Clarke, William J., Raleigh
*Freeman, E. B., Raleigh
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*Holden, W. W., Raleigh
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Iredell, James, Raleigh
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*Jones, Alpheus, Raleigh
Manly, Charles, Raleigh
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Miller, Henry W., Raleigh
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Rogers, Sion H., Raleigh
Saunders, R. M., Raleigh
*Shepard, James B., Raleigh
*Whitaker, Wilson, Raleigh
*Whiting, S. W., Raleigh
Wilder, Gaston H., Raleigh

WARREN

Eaton, William, Jr., Warrenton
Hall, Edward, Warrenton
*Plummer, William, Warrenton
Ransom, Matt. W., Warrenton

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Strong, George V., Goldsboro
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McMillan, Frank B., Rockford
†Pearson, Richmond M., Rockford

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ABATEMENT.

1. A *scire facias*, to recover a penalty imposed on a sheriff for not returning process cannot, upon his death, be revived against his representatives. *Mason v. Ballew*, 483.

2. An action of ejectment does not abate by the death of the lessor of the plaintiff. *Wilson v. Hall*, 489.

See Ejectment.

ACCESSORIES.

There can be no accessories in inferior offenses; but whatsoever will make man an accessory before the fact in felony will make him a principal in trespass and other misdemeanors, as in battery and forgery, at common law. Procurers and aiders, therefore, in such cases are principals, and may so be charged in an indictment. *S. v. Cheek*, 114.

ACTIONS.

One who has purchased the interest in a chose in action without having acquired a legal title, and thus is authorized, as agent, to bring a suit at law in the name of his assignor, may, also, in the same name, prosecute any action growing out of the same, and collateral to it; as, in this case, an action against a sheriff for not serving in due time a notice to take depositions placed in his hands by such assignee. *Waterman v. Williamson*, 198.

ACTION ON THE CASE.

1. In an action on the case for the seduction of the plaintiff's daughter it is competent for him to give in evidence, on the question of damages, the character of his own family, and, also, the pecuniary circumstances of the defendant. *McAulay v. Birkhead*, 28.

2. In such an action it is not competent for the defendant to show that the daughter consented willingly to the seduction, or even that she, in fact, seduced the defendant—her consent not depriving the plaintiff of his right of action. *Ibid.*

3. When a person undertakes to load a boat with goods, and by his negligence the goods are suffered to fall so as to injure the boat, he is liable for the damages to the owner of the boat. *Pate v. R. R.*, 325.

4. But where such person did not act as agent of the defendants in loading the boat, but the loading was undertaken and conducted by another person, the owner of the goods, the defendants are not liable. *Ibid.*

5. Where a creditor had placed a note in the hands on an officer for collection, and another, by persuasion, induced the officer not to collect and the debtor not to pay the debt: *Held*, that the creditor had no ground for an action on the case against the other parties. *Platt v. Potts*, 455.

ACTION ON THE CASE—*Continued.*

6. A declaration in deceit for the sale of an unsound negro, alleging the unsoundness to have proceeded from drunkenness, is not supported by evidence showing merely that the negro had a propensity to get drunk and a habit of intemperance. The unsoundness must be shown to have existed before the sale. *Eaves v. Twitty*, 468.

See Trespass.

AMENDMENTS.

Courts have power to amend their process and records, notwithstanding such amendment may affect existing rights. *Green v. Cole*, 425.

APPEAL.

1. An appeal lies to the Superior Court from an order of the county court allowing an amendment or setting aside a judgment for irregularity. *Williams v. Beasley*, 112.
2. Upon the plea of "*nul tiel record*," whether the record exists is a question of fact; what is its legal effect is a question of law. From a decision on the former the party cannot appeal: from a decision on the latter he may. *Trice v. Turrentine*, 212.
3. The act of Assembly of 1850, ch. 3, authorizing an appeal by one defendant, where there are more than one, does not apply to appeals taken before that act went into operation. *Smith v. Calloway*, 477.

See Bastardy.

ARBITRATION AND AWARD.

1. There is no statutory provision in this State upon the subject of awards; but it is the practice to enter up judgments upon them in those cases where, by the common law, an attachment would have been granted for a disobedience of a rule of court, that is, where the rule has been made by the court in a cause pending therein. *Gibbs v. Berry*, 388.
2. An award must be certain, and this certainly must appear upon the face of the award. The award must also be final, as to all the matters submitted, so as to put an end to the suit. *Ibid.*
3. But where, in addition to the general rule for arbitration, it was entered of record that "it is further ordered by consent of the parties, that the said referees inquire and ascertain the dividing line of the lands of the said parties, and that they lay off and establish the lines which they shall ascertain, etc., and cause a correct plat to be made, etc., and that the said parties, upon said dividing line being so established, make and execute such releases to each other that may be necessary and proper," and the referees made a report according to this submission: *It was held*, that the court should not set aside this report, but leave it to the parties to assert their claims in a court of equity, as upon a contract. *Ibid.*

See Ejectment.

ARREST.

1. To constitute a legal arrest, it is not necessary that the officer should touch the person of the individual against whom the precept has

ARREST—*Continued.*

issued. It is sufficient if, being in his presence, he tells him he has such a precept against him, and the person says "I submit to your authority," or uses language expressive of such submission. *Jones v. Jones*, 448.

2. But in all such and similar cases the question is whether there was or was not an intention to arrest, and so understood by the parties; and this is a matter to be left to the jury, and cannot be decided by the court alone. *Ibid.*

ASSAULT AND BATTERY.

1. It seems that, though an assault with intent to murder was formerly considered a felony, it is now held to be a misdemeanor only; and although it may be a high misdemeanor, it is not subject to any additional punishment, but only such as in the discretion of the court may be inflicted for other misdemeanors at common law. *S. v. Boyden*, 505.

2. Where a person had been forbidden a house by the owner, but visits it at the invitation of a servant, at an hour when he may expect to meet the owner, for the purpose of having music; when, instead of bringing his violin, he comes armed with a deadly instrument a six revolving pistol; when, upon being ordered out by the owner, he asked the latter to go with him, and this being refused, he stopped at the door and made an assault by presenting his pistol—this, if death had ensued, would have been murder, and, therefore, even according to the old authorities, he might well be convicted of an assault with intent to murder. *Ibid.*

ASSUMPSIT. See Contracts.

ATTACHMENT.

1. An attachment, like a warrant, need not contain any certain day of return, and conforms to the statute if made returnable "within thirty days" from its date. *Hiatt v. Simpson*, 72.

2. Although a plaintiff who obtains a judgment in an attachment levied on land may have taken judgment against the garnishees, he still has a right to have the land sold under the levy and the order founded thereon. *Simpson v. Hiatt*, 470.

BAILMENT. See Contracts.

BASTARDY.

1. In a proceeding in bastardy, returned to the court, the following entry was made: "Compromised. Defendant enters into bond, and is to pay all costs." And judgment was rendered that the defendant pay $20 *instanter*, to E. L., the mother: *Held*, that this was a judgment of the court, which could not be set aside at a subsequent term at the instance of the defendant. *S. v. Auman*, 241.

2. *Held further*, that on appeal to the Superior Court from the order in the county court setting aside such judgment, the Superior Court cannot enter judgment *de novo* for the $20, but must issue a *procedendo*. *Ibid.*

BASTARDY—*Continued.*

3. In a proceeding under the bastardy acts, evidence may be given on the part of the defendant, under the act of 1850-1, that the woman whose examination is offered is unworthy of credit, from her character or from any other cause. *S. v. Floyd*, 382.

4. A child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law, and where the mother was visibly pregnant at the marriage it is a presumption *juris et de jure* that the child was the offspring of the husband. *S. v. Herman*, 502.

5. Where the examining justices do not find whether a child, alleged to be a bastard, was born in wedlock or not, that being a question before them, nor find whether, if born in wedlock, the facts existed which would still render it a bastard, as *nonaccess* or impotency of the man who was married to the woman at the time when she had the child, there is sufficient ground for quashing the proceedings. *Ibid.*

6. So, also, if they pass upon these facts, on the testimony of the mother alone, for as to them she is an incompetent witness. *Ibid.*

BEQUESTS AND DEVISES.

1. A bequest was as follows: "I give and bequeath to E. and S. all the negroes I sent to my daughter P., to them and their heirs forever; and if *they* should die without an heir, for said negroes to be equally divided between H. and all my children." E. married the defendant, and died, without leaving a child. S. married the plaintiff, is still living, and has several children: *Held*, that E. and S. took vested estates; that cross-remainders could not be implied, and that E.'s estate could only be defeated upon the contingency of Sarah's dying leaving no child. *Coffield v. Roberts*, 277.

2. A. devised the premises in dispute as follows: "I lend the tract of land I now live on unto my wife, during the time she remains a widow." He also lends her certain slaves. "Immediately after the marriage of my widow, or directly after the death of my wife, Polly, I give all the before-mentioned estates, within doors and without, to my loving wife's heirs, by consanguinity, with the exception of Elizabeth McPherson, and I give and bequeath to her $1." The testator died in May, 1837; his will was proved in the same month, when she dissented. In the August following she intermarried with Andrew Flora, and shortly afterwards was delivered of a child, of which she was pregnant at the death of the testator. The child lived about six months and died, and within a few months after the death of that child, she had by Flora a child, the lessor of the plaintiff. The testator's wife had five brothers and sisters, who were living when the testator made his will, and when he died. The defendant is the heir, *ex parte paterna*, of the testator's posthumous child, who was the heir of the testator: *Held*, *first*, that the lessor of the plaintiff could not claim as heir of the deceased child, because it did not appear that he was born within ten months after the death of such child, and because, even if so born, he was only an heir *ex parte materna*, and therefore was not entitled to the land, derived to the child, either

BEQUESTS AND DEVISES—*Continued.*

by descent or devise, from its father: *Held further*, that on marriage of the widow the land vested absolutely in the child, and upon its death descended to its heirs *ex parte paterna*. *Flora v. Wilson*, 344.

3. Even if the devise were contingent at first, still the lessor of the plaintiff cannot take as one of the remaindermen, because the particular estate of the mother, whether determined by her dissent to the will or by her marriage, did not continue to his birth, and consequently his contingent estate would have been defeated. *Ibid.*

BIGAMY.

In an indictment for bigamy, the place where the first marriage was had is not material. It is sufficient to set forth that there was a prior marriage. *S. v. Bray*, 28.

BILLS AND PROMISSORY NOTES.

The maker of a promissory note, made payable on demand at a particular place, is not bound to pay it until it is presented at the place where it is expressed to be payable. And there is no ground for a distinction upon this point between notes made by a natural person and those made by a corporation. Nor can such a note be used as a set-off or offered as a payment to the maker, unless so presented. *Bank of the State v. Bank of Cape Fear*, 75.

BONDS.

A bond with a condition that the plaintiffs should "break the will" of a deceased person, of whom the obligors were next of kin, or, "if they failed to break the will, should pay all the costs of the suit that shall be brought," is void on the ground of maintenance and as being against public justice. *Martin v. Amos*, 201.

BOOK DEBTS.

Under the book-debt act, the book and oath are only evidence of small articles which have been delivered within two years; but they are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party and to disprove all of his claim, except such items as are stated in the book, upon the ground that this contains all just credits, and consequently sets forth all the amount, to which the opposite party is entitled. *Alexander v. Smoot*, 461.

BOUNDARIES.

1. In ascertaining the boundaries of a grant, when a point is described as being a given distance from a certain other point, a direct line is implied, unless there be something to rebut the implication. *Slade v. Etheridge*, 453.

2. The circumstance that both points are on the same river has no tendency to destroy the implication. *Ibid.*

3. What are the boundaries of a tract of land is a question of law, being a mere question of construction. Where a line is, and what are the facts, must, of course, be found by the jury. *Burnett v. Thompson*, 379.

BURGLARY.

1. In burglary there must be a breaking, removing, or putting aside of something material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion. A door or window left open is no such security. But if the door or window be shut, it is not necessary to resort to locks, bolts, or nails. A latch to the door or the weight of the window is sufficient. *S. v. Boon*, 244.

2. When a man burglariously entered a room where a young lady was sleeping, and grasped her ankle, without any attempt at explanation when she screamed, this is some evidence of an attempt to commit a rape, and must be submitted by the court to the jury. *Ibid.*

CERTIORARI.

1. When the proceedings of an inferior tribunal are not according to the rules of the common law, the aggrieved party is entitled to a *certiorari;* but only to have them reviewed as to matters of law. *S. v. Bill*, 373.

2. If a party, entitled to an appeal from an inferior to a superior tribunal, is denied that right, or deprived of it by fraud, or accident, or inability to comply with the requirements of the law, he is entitled to have his whole case, both as to law and fact, brought up by *certiorari*, and to a trial *de novo* in the Superior Court. *Ibid.*

CLERKS OF COURTS. See Mortgages.

CONSTABLES.

1. To show that a person was a constable it must appear that he was elected by the people as prescribed by act of Assembly (Rev. Stat., ch. 24), or was appointed by the court to supply a vacancy, as provided by the said statute. *S. v. Lane*, 253.

2. A. placed notes in the hands of Lawrence, a constable, for collection. Lawrence went to Alabama without collecting them. A. then took them from Lawrence's saddle-bags and delivered them to Gupton, another constable, taking and placing in the saddle-bags a receipt from Gupton, promising to account with Lawrence. Upon Lawrence's return, he received the money from Gupton: *Held*, that the sureties on Lawrence's constable's bond were not discharged from their liability. *S. v. Lawrence*, 284.

See Limitations.

CONSTITUTION.

1. Corporations, though not mentioned in the Constitution of the United States, are within its provisions, as they are within the provisions of any other general law. *Bank v. Bank*, 75.

2. A legislative charter to a corporation is a contract of inviolable obligation, and no state can constitutionally pass any law impairing such contract. *Ibid.*

3. The act, therefore, passed at the General Assembly 1850-51, entitled "An act in relation to exchanges of notes between the several banks

CONSTITUTION—*Continued.*

of the State," which declares that when a bank or its branch presents for payment a note of another bank, the latter may pay its note with a note or notes of the same, without regard to the place where the same may be payable, is contrary to the Constitution of the United States, and therefore void. *Ibid.*

CONTRACTS.

1. Although there be a special contract to do or not to do a particular thing, a party is not bound to resort to it to recover damages for a breach, but may declare in *tort* and say that the defendant has neglected to perform his duty. *Robinson v. Threadgill*, 39.

2. In the case of a bailment, the bare being trusted with another's goods is a sufficient consideration for the engagement, if the bailee once enter upon the trust and takes the goods into his possession: as where a man undertakes to collect notes for another, without mentioning any consideration, and takes the notes for that purpose, there is a sufficient legal consideration for the engagement. *Ibid.*

3. Assumpsit will lie for goods sold and delivered, when the contract is reduced to writing, as well as an action on the special contract. If the sale is for cash, assumpsit may be brought forthwith; if on time, at the expiration of the term of credit. If a sale is on time, and a note and security are not given according to the contract, assumpsit will lie at the end of the time, or the party may sue before, when he must declare specially for the omission to give the note and security. *McRae v. Morrison*, 46.

4. A contract was as follows: A. was to cultivate a plantation belonging to B., in 1849. A. was to furnish the means and materials to make the crop, as far as he was able, and such as were not furnished by him were to be furnished by B. At the end of the year B. was to sell the crop and have one-third, and then deduct all the expenses, and pay the residue to A. *Held*, that this was not a leasing of the land by one party to the other, not a case of hiring a laborer by the owner of the land, but the parties were joint owners of the crop; and B., having survived A., had a right to the property as joint owner, in order to dispose of it according to the contract. *Moore v. Spruill*, 55.

5. Where, in consideration of a promise to pay the debt of another, the defendant receives property and realizes the proceeds thereof, the promise is not within the mischief provided against by the statute of frauds, and the plaintiff may recover on the promise, or in an action for money had and received. *Stanley v. Hendricks*, 86.

6. But it is otherwise where the new promise is merely super-added to the original one—not substituted for it. *Ibid.*

7. Assumpsit for the reward offered by the following advertisement for the apprehension of a stolen negro and the felon: "A reward of 100 for the apprehension of both, or $50 for the negro out of the State; $25 for the apprehension of the negro within the State, and his delivery to the subscriber, or for keeping him so that his owner gets him again." *Held*, that the reward of $100 was offered only

CONTRACTS—*Continued.*

for the apprehension of the felon and the negro, if taken without the State, and $25 for the negro if taken within the State. *Washburn v. Humphreys*, 88.

8. Contracts with lunatics are not all absolutely void; but such as are fairly made with them for necessaries, or things suitable to their condition and habits of life, will be sustained. *Richardson v. Strong*, 106.

9. Where a person is insane, so as to attempt injury to himself and the destruction of his property, the services of a nurse and guard fall within the class of necessaries, as defined by law. *Ibid.*

10. A public agent is not answerable personally for any contract made by him in his official capacity, unless he specially binds himself to be personally responsible. *Tucker v. Justices*, 434.

CORPORATIONS. See Constitution; Bills, etc.

COURTS.

1. When it appears from the record that a cause was tried at a special term of a Superior Court, it is to be presumed, *prima facie*, that an order for holding it was duly made, and that it was duly held. *Sparkman v. Daughtry*, 168.

2. A Superior Court at a special term has the same power to remove a cause to another county that it has at a regular term. *Ibid.*

DEED.

There is no rule of law which directs that a consideration is to be inferred from the fact of the execution of a sealed instrument. A deed is valid without a consideration, and therefore the law makes no inference, one way or the other, as to the consideration. *Walker v. Walker*, 335.

DETINUE.

1. In an action of detinue, a declaration for "*a set of turner's tools*" is too indefinite, and cannot be supported. *March v. Leckie*, 172.

2. But if there be added the words, "being the same formerly owned by one Burkett," the description becomes sufficiently specific, and capable of being identified. *Ibid.*

DIVORCE.

1. As the allegations in a petition for a divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others, that the allegations and proof should correspond; otherwise, the court cannot decree a divorce. *Foy v. Foy*, 90.

2. Where a petition for a divorce is amended, the facts alleged in the amendment must be sworn to, or they will not be regarded. *Ibid.*

3. If a wife leaves a husband, and refuses to live with him, *without sufficient cause*, and he afterwards lives in adultery, this is no cause for granting her a divorce. *Ibid.*

DIVORCE—*Continued.*

4. If a husband is accused of a crime, or is guilty of it, this is no sufficient cause for the wife to refuse to live with him, and she is not thereby justified in a violation of the marriage vow. She took him "for better or for worse." *Ibid.*

DOWER.

1. Under our statute (Rev. Stat., ch. 121, sec. 11) barring the claim of an adulteress for dower, "if she willingly leave her husband and go away and continue with her adulterer," although the wife doth not continually remain in adultery with the adulterer, yet if she be with him and commit adultery, it is a "continuing" within the statute; and if she once remain with the adulterer in adultery, and he afterwards keep her against her will, or if the adulterer turn her away, she shall still be said "to continue" with the adulterer, within the statute. *Walters v. Jordan*, 361.

2. There may not be any adultery before the wife leaves her husband, nor an elopement with the man with whom she afterwards committed adultery, but she is barred by adultery with any person supervenient upon her willingly leaving her husband. *Ibid.*

3. But in order to support, under this statute, a bar to the claim of dower, it must appear that the wife *willingly* left her husband. If driven away by him or by his compulsion, the wife does not forfeit her dower. *Ibid.*

4. It is immaterial whether the adultery was committed before or after the separation. *Ibid.*

PEARSON, J., dissents.

EJECTMENT.

1. An action of ejectment does not abate by the death of the lessor of the plaintiff. *Thomas v. Kelly*, 43.

2. Where upon the death of the lessor some of the heirs come in and are made parties, and others refuse to do so, a nonsuit cannot be entered for that cause. *Ibid.*

3. The defendant may, if he thinks proper, obtain a rule upon the heirs to give security for the costs, which the court will grant if they are in danger, as if the sureties to the prosecution bond, already given, are insolvent or in doubtful circumstances. *Ibid.*

4. Where A. conveyed land to B., and subsequently remained in the actual adverse possession for more than seven years: *Held*, that A. could not recover, without showing some color of title acquired after his conveyance to B., and that his possession was under that colorable title. *Johnson v. Farlow*, 84.

5. If A. could have shown that his colorable title and adverse possession commenced after his deed to B., that deed would not have estopped him; because the title so claimed would not have been inconsistent with that he conveyed to B. *Ibid.*

EJECTMENT—*Continued.*

6. The last proviso to the first section of the act of limitations, Rev. Stat., sec. 1, extends to cases where the plaintiff has been nonsuited, as well as to those in which a verdict has been found against him. *Long v. Orrell*, 123.

7. Where there are several demises of divers persons in the declaration in the first action of ejectment, it is not necessary that a demise from each of those persons should be laid in the declaration in the second action, but it is sufficient for the second declaration to be on the single demise from that one or more of the lessors in the former suit, in whom the title is found to have been; for the count on each of the several demises is, in law, the same as a separate action, and, therefore, the title of each person is saved, who was a several lessor in such action. *Ibid.*

8. By bringing an ejectment, a party then having the right of entry shall continue to have it as long as that action pends, and afterwards, also, if within one year afterwards he will bring another action, and so on from time to time—no matter who may be at any time the tenant in possession. *Ibid.*

9. An attempt to procession land under the act, Rev. Stat., ch. 91, is not embraced in the last proviso of the first section of the act of limitation, Rev. Stat., ch. 65, so as to prevent actions of ejectment from being barred if brought within one year after a failure to recover in a preceding action. *Crump v. Thompson*, 150.

10. Where one enters under a conveyance of the some colorable title for a particular parcel of land, the rule is that possession of part is *prima facie* possession of the whole, not actually occupied by another, as the documentary title defines the claim and possession. *Thomas v. Kelly*, 269.

11. But it is otherwise when one enters without any color of title, for then there is nothing by which the possession can be constructively extended beyond his occupation. *Ibid.*

12. Although in an action of ejectment the usual course is to recover nominal damages, leaving the real damages to be recovered in the subsequent correlative action of trespass for the *mesne* profit, yet it would not be error to direct that the actual damages should be assessed in the ejectment, the divisions of the actions being merely for convenience. *Miller v. Melchor*, 439.

13. Therefore, it is no objection to the report of arbitrators, to whom an action of ejectment has been referred, to direct the amount of damages sustained by the trespass to be entered for the plaintiff. *Ibid.*

14. If a lessor, who dies, be tenant for life, judgment may be rendered, though the court may refuse to amend a writ of possession thereon. *Wilson v. Hall*, 489.

15. Where the estate is continued in heirs, judgment is to be rendered as if the lessor were alive; and a writ of possession may also be delivered, though that is to be done under the directions and control of the court, as to the persons entitled to be put in by the sheriff. *Ibid.*

EJECTMENT—*Continued.*

16. Where the defendants are a part of the heirs of the deceased lessor, the proceedings under the judgment and execution should be accordingly modified by not putting the defendants out of possession, but by putting in the other heirs with them. *Ibid.*

ESTOPPEL.

1. A widow, continuing in possession of land, is estopped to deny the title derived under her husband's deed. *Grady v. Bailey*, 221.

2. One may be equally estopped, as to two adverse claimants, so as to be concluded when sued by either. *Ibid.*

3. Thus, where a widow in possession, claiming dower, was estopped by deed given by her husband. She cannot remove the estoppel and defeat the bargainee by giving up her possession to one claiming under a *fi. fa.* prior to the deed, and then immediately resuming the possession under him. *Ibid.*

4. The owner of a tract of land purchased at the Cherokee sales is estopped to deny the right of one who has bought at a sale under an execution against him, though such purchaser at the Cherokee sales has not yet paid the State, and therefore has acquired no legal title. *Hunsucker v. Tipton*, 481.

5. A lessee cannot deny his lessor's title until he is discharged from the estoppel arising out of his lease and possession, by yielding up possession to his lessor. His acceptance of a lease from another and acknowledgment of possession under him will not discharge the estoppel. He may be equally estopped as to each. *Freeman v. Heath*, 498.

EVIDENCE.

1. Where a witness to a contract, subsequently to his attestation, acquires an interest in the contract through or under one of the contracting parties, he is an incompetent witness for the party so creating the interest, unless the circumstances entirely negative any idea of fraud, as where the interest was thrown upon him by the act of the law, or where, after attestation of an instrument, the witness has married the party seeking to establish the instrument. *Overman v. Coble*, 1.

2. Where a plaintiff gives evidence of the declarations of a defendant, the defendant has a right to call for all the defendant said at the time, provided it be pertinent to the issues or to the declarations proved by the plaintiff, but not otherwise. *Ibid.*

3. Under our statute (Rev. Stat., ch. 31, sec. 68) the deposition of an absent witness may be received in evidence whenever the witness has left the State either with an intention of changing his domicile or under the expectation of being absent for a time which will include two terms of the court, say six months. But it cannot be received when the witness is absent temporarily for a short time, as in the case of a seaman on a voyage to New York or Charleston, when his return may be expected in two or three months at farthest. *Alexander v. Walker*, 13.

EVIDENCE—*Continued.*

4. A party may prove by his own affidavit the loss of any instrument, unless it be a negotiable paper. *McRae v. Morrison*, 46.

5. The impression of a witness who professes to have any recollection at all is some evidence, the weight of which is a matter for the jury, and will, of course, depend very much upon circumstances. *Ibid.*

6. Where there was a conspiracy to commit an offense, it is not competent on the trial of one of the conspirators to give in evidence the declarations of another conspirator, made after the offense has been committed, because they were not made in furtherance of the common design. *S. v. Dean*, 63.

7. A witness may refresh his memory by looking at a book of entries, kept by himself, without producing the book on trial. *S. v. Cheek*, 114.

8. To receive in evidence, under our statute, a certified copy from the Secretary of State of an act of Assembly of another State, it is sufficient that the seal of the State be attached to the certificate required from the Governor. It is not necessary that it should be attached to the Secretary's certificate. *Ibid.*

9. A transcript of a statute, once duly certified by the secretary of State in the manner prescribed by our law, is evidence at all times of its being in force according to its terms, unless a repeal be shown. *Ibid.*

10. Evidence is admissible, as to the genuineness of a bank note, of the opinion, not only of cashiers and tellers of banks, but also of merchants, brokers, and others who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them and able to judge between a true and a counterfeit bill, and have that knowledge, among other things, tested by the fact that no bill, passed by the witness has been returned, though there has been ample time for it, if any of them were not genuine. *Ibid.*

11. In trespass for false imprisonment, the plaintiff proved that, under a claim of right, he entered a field cultivated and occupied by one of the defendants, and gathered and took away corn there growing, whereupon he was arrested for petit larceny by the defendants, and committed to jail. The defendants then offered to prove that the plaintiff's land had been sold by the sheriff under an execution against the plaintiff himself. This evidence was offered in mitigation of damages, and rejected by the court below: *Held*, that under these circumstances the evidence should have been received. *Sawyer v. Jarvis*, 179.

12. To an exception for the rejection of evidence it is a sufficient answer that it was irrelevant. *S. v. Arnold*, 184.

13. Where evidence offered is irrelevant in law and *calculated to mislead or prejudice the minds of the jury*, it would be error in the court to receive it. *Ibid.*

EVIDENCE—*Continued.*

14. In the trial of an indictment for murder, when the dying declaration of the deceased is that "A. B. has shot me, or has killed me," the court must presume, *prima facie*, that the deceased intended to state a fact of which he had knowledge, and not merely to express an opinion. The jury must judge of the weight of this, as of other evidence, by the accompanying circumstances. If he merely meant to express his opinion or suspicion, as an inference from the other facts, the jury should disregard it as evidence in itself. *Ibid.*

15. When the defense of an indictment for murder is that the prisoner was under the age of presumed capacity, the *onus* of proof lies upon the prisoner. If there be no proof and the age can be ascertained by inspection, the court and jury must decide. *Ibid.*

16. On the trial of an indictment for murder, the affidavit of the deceased, though not taken according to the act of 1715, is competent and proper evidence as a dying declaration. *Ibid.*

17. It *seems* that, although a proposition to compromise, rejected by the other party, could not be heard, yet admissions of facts made by the defendant in the conversation with the party proposing the compromise may be received. But there can be no doubt that such admissions are competent evidence when made to one who informs the defendant that he has no authority to compromise. *Daniel v. Wilkerson*, 329.

18. There is no law requiring leases for years to be registered, and therefore a copy from the register's books is not evidence, as in the case of deeds for freehold estates. *Burnett v. Thompson*, 379.

19. A map, which is not shown to have been made before the conveyance under which a party claims, is not evidence for said party. *Ibid.*

20. Proof of a deed by one witness is sufficient; and proof of the handwriting of one witness, both being dead, is also sufficient. *Ibid.*

21. The general rule is that a witness must speak to facts, and cannot give his opinion as derived from these facts. The only exceptions are as to questions of science and of sanity. *Bailey v. Pool*, 404.

22. It is not necessary for a purchaser at an execution sale to produce a judgment corresponding exactly with the execution, nor, it seems, any judgment at all. *Green v. Cole*, 425.

23. The declarations of a sick person, at any particular time, or his sufferings and condition, are evidence so far as they refer to the time at which they are made; but declarations of such persons as to their state and condition at any preceding period are not admissible. *Lush v. McDaniel*, 485.

24. Physicians alone are permitted to give their opinion as to the existence, nature, or extent of disease in any person. *Ibid.*

25. Where it is alleged that a slave was unsound at the time of her sale, in consequence of her then having the venereal disease, evidence of physicians is competent to show that the disease did not at that time prevail in the neighborhood in which she was sold, but did prevail in the town, about 75 miles distant, to which she was taken by the purchaser soon after the sale. *Ibid.*

See Slander; Fraud; Wills; Execution.

EXECUTIONS.

1. An execution to which a sheriff of a county is a part—either plaintiff or defendant—directed to such sheriff, is null and void; and the sheriff is not bound to make any return thereon, and, consequently, cannot be amerced for neglecting or refusing to do so. *Bowen v. Jones*, 25.

2. Where A., a defendant in an execution, places funds in the hands of the sheriff for the satisfaction of the execution, and the sheriff enters on it "Satisfied," but before he makes his return another arrangement is made between the sheriff and A., and the funds are withdrawn and applied by A. to another purpose, upon which the sheriff strikes out the entry of satisfaction: *Held*, that when sued upon the judgment on which this execution issued, A. could not avail himself of this arrangement with the sheriff in support of a plea of payment, but that the plaintiff, though he might proceed against the sheriff, yet had not lost his remedy upon the judgment. *Tarkinton v. Guyther*, 100.

3. In claiming land under an execution sale, the inquiry is, Has the sheriff sold this particular land? and his return is to be taken as true until the contrary appears. *Jackson v. Jackson*, 159.

4. Where the sheriff returned, "Levied on 265 acres of land, lying, etc., whereon Iredell Jackson now lives," and in his deed conveyed two tracts, one of 100 acres and one of 165, not contiguous, but separated by another small tract, and it appeared that the defendant lived on one tract, and cultivated the whole as one plantation: *Held*, that the levy and conveyance by the sheriff were not too indefinite nor inconsistent. *Ibid.*

5. *Held further*, that in such a case parol evidence of the identity of the land was properly admissible. *Ibid.*

6. In a forthcoming bond it is not necessary to insert the names of the parties at whose instance the executions levied on the property have issued. *Grady v. Threadgill*, 228.

7. The obligors in a forthcoming bond are not discharged because the return day of the executions levied is before the day on which, by the terms of the condition, the property was to be delivered, though no new executions were issued. *Ibid.*

8. No form is prescribed by our act of Assembly for a forthcoming bond, and a condition that the property shall be forthcoming or be delivered at the time and place of sale is sufficient. *Ibid.*

9. To enable a plaintiff to maintain an action on a forthcoming bond, it is not necessary for him to have paid the amount of the executions to the plaintiffs therein. *Ibid.*

10. The omission to deliver to the surety in the forthcoming bond a descriptive list of the property levied on does not render the bond void. It is a privilege of the surety, and he may waive, or not require it, if he thinks proper. *Ibid.*

11. A sheriff is not bound to collect an execution, and pay the amount to the plaintiff, before the return day of the writ. *Patten v. Mann*, 444.

EXECUTIONS—*Continued.*

12. Where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the one from whom it is collected has no cause of action against the sheriff, though he claimed to be only a surety, and though the plaintiff in the execution directed the sheriff to collect it from the other. *Shufford v. Cline*, 463.

13. Although a *venditioni exponas* is not a part of the record, so as to carry absolute verity with it, yet it is the authority under which an officer acts and his only authority to sell, and is therefore a necessary part of the evidence to support the title of a purchaser at a sale under such an execution. *Simpson v. Hiatt*, 470.

14. So the return of a sheriff on such *venditioni*, being an official act, is also competent evidence. *Ibid.*

15. In this case the evidence as in the case of the sheriff's deed, is only *prima facie*, and may be rebutted by other evidence. *Ibid.*

16. If a sheriff levies an execution upon land, when there is sufficient personal property to satisfy the debt, any injury inflicted is a matter between the sheriff and the owner of the property, the defendant in the execution. *Ibid.*

17. The sheriff's return upon an execution is *prima facie* evidence of a sale, and as to who was the purchaser. *Simpson v. Hiatt*, 473.

18. Where one, against whom a *fi. fa.* has issued pays the amount to the plaintiff in the execution, the sheriff, who did not levy the execution before the return day, whereby it became *functus officio* and was not in law in his hands at the time of the payment, is not entitled to recover commissions from the defendant in the execution, without an express promise to pay them. *Kincaid v. Smyth*, 496.

EXECUTORS AND ADMINISTRATORS.

1. In a suit by legatees or distributees against an executor or administrator, this Court has the power to review the decision of the court below in the allowance of commissions. *Shepard v. Parker*, 103.

2. This power may be exercised not only where the allowance has been made upon a wrong principle, as in the case of a retainer, or a delivery over of slaves being considered a disbursement, but also when the commissions allowed below are *clearly* either inadequate or excessive. *Ibid.*

3. Where the exercise of discretion is in reference to a matter arising collaterally and which does not present itself as a question in the cause, the decision in the court below is conclusive, as in the case of amendments, etc. But when the discretion is exercised in reference to a *question in the cause*, the appeal, bringing up the whole case, necessarily brings that up. *Ibid.*

4. The allowance of commissions to executors and administrators is, in every case, a *question in the cause*. *Ibid.*

5. Commissions may be allowed on a note, due to the testator or intestate, delivered over as a payment in cash by the executor or administrator to a legatee or distributee. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

6. It is not necessary, in any case, for the representative of a deceased plaintiff to issue a *scire facias* to make himself a party, but he may be made so by an application to court, and the law keeps the defendant in court for two terms for that purpose. *Borden v. Thorpe*, 299.

7. Where, after an appeal to the Supreme Court, the defendant, appellant, dies, and there has been an administration *de bonis non* granted, if no error is found, the judgment is that there was no error in the original judgment, and that the plaintiff recover here the damages and costs against the administrator *de bonis non*, to be levied *de bonis intestati*, and also against the sureties for the appeal. If the plaintiff cannot thus obtain satisfaction, he must proceed either by *scire facias* or action of debt on the judgment against the administrator *de bonis non*, in order to charge him therein with assets; for the question of assets cannot be put in issue upon a *scire facias* to revive a suit before judgment. *Ibid.*

8. It has been the practice in this State, when a defendant dies while a cause stands on issue, to allow his executor, when brought in, to plead the want of assets; but it is a practice tolerated among the profession for their own convenience, and has passed *sub silentio*, and cannot be sustained if objected to. *Ibid.*

9. A *scire facias* against an executor, before final judgment, is merely to make the executor a party to the record, and, though the judgment be against the executor, it is not a judgment fixing him with assets; a second *scire facias* is necessary for that purpose, in which he may plead a want of assets, or make any other defense which he might have made if sued on a judgment against the testator. The only instance in which a plea can be admitted is that of release, or satisfaction since the last continuance, which, from necessity, would probably be received upon a proper case shown, as, indeed, they might have been pleaded by the original defendant. *Ibid.*

10. In no instance has the executor of a defendant the right to make a personal defense, except only to deny his representative character, which may be summarily determined by the court, or by a collateral issue. *Ibid.*

11. If, on an appeal to the Supreme Court, the judgment below be not reversed, the actual judgment here must be for the damages assessed, *de bonis intestati*, and against the sureties for the appeal. *Ibid.*

12. On the trial of a collateral issue between the administrator and heirs, as to assets, in a suit by a creditor, one of the heirs is an incompetent witness for the administrator, though he may have released to him all his interest in the personal estate, and also an amount supposed to be the value of the real assets descended to him. *Carrier v. Hampton*, 436.

13. In such a proceeding by *sci. fa.* any one of the heirs can tender the issue, and, if found against the administrator, the creditor would have execution against him for the sum found in his hands, which would necessarily operate to the exoneration *pro tanto* of all the real estate descended. *Ibid.*

See same case, 33 N. C., 307.

FEMES COVERT.

1. Property conveyed to a married woman, after a decree obtained in her favor under the act, Rev. Stat., ch. 39, sec. 12, is not protected against the claims of the husband's creditors, if the husband has paid, either from his own means or the earnings of his infant children, who live with him, the whole or any considerable portion of the purchase money. *Worth v. York*, 206.

2. A certificate of probate on the deed of a *feme covert* set forth that the deed "was exhibited in open court and the execution thereof by (the husband) was proved by" (T. S., a subscribing witness) "and acknowledged by" (the *feme covert*); "when, on motion in open court," (L. S. Esq.), one of "the presiding justices, was appointed to take the private examination of" (the said *feme covert*) "as to her consent in signing the said deed; who reported she acknowledged to have signed it of her own free will and accord, without any compulsion from her said husband. Ordered to be recorded": *Held*, that the probate was sufficient to make the deed valid against the wife. *Beckwith v. Lamb*, 400.

FENCES.

A defendant may be convicted on an indictment, under the act of 1846-'47 forbidding the removal of fences, etc., if it appear that the ground which the fence surrounds was in a course of preparation for making a crop, or used in the course of husbandry, though no crop was actually planted or growing on it at the time of such removal. *S. v. Allen*, 36.

FORCIBLE ENTRY.

1. A forcible detainer is not indictable where the entry was peaceable and lawful. *S. v. Godsey*, 348.

2. From the finding of the jury that the defendant "*unlawfully* and with a strong hand detained," it cannot be implied that the entry was also unlawful. *Ibid.*

FORGERY.

1. Where a genuine instrument is altered, so, as to give it a different effect, the forgery may be specially alleged, as constituted by the alterations, or the forgery of the entire instrument may be charged. *S. v. Weaver*, 491.

2. An indictment for forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelt as they appear spelt in the original. *Ibid.*

FRAUDS AND FRAUDULENT CONVEYANCES.

1. Where A., being in embarrassed circumstances, purchased a tract of land from B. and paid for it, and then caused a deed to be made from B. to A.'s sons, with a view of defrauding his creditors: *Held*, the personal estate being exhausted, and debts remaining unpaid, that A.'s administrator could not obtain a license from the court, under the act of 1846-'47, to sell the said land for the payment of the debts; because the fraudulent conveyance was not made by the

FRAUDS AND FRAUDULENT CONVEYANCES—*Continued.*

intestate himself, and the trust in the sons was one which could not have been sold by *fi. fa.* or attachment in the lifetime of A., nor could a court of equity interfere to enforce the performance. The only remedy for the creditor was by a suit in equity, founded, not on the trust, but on the fraud by which the property of A. had been withdrawn from the payment of A.'s debts. *Rhem v. Tull*, 57.

2. What constitutes fraud is a question of law. *Hardy v. Simpson*, 132.

3. In some cases fraud is *self-evident*, when it is the province of the court so to adjudge, and the jury has nothing to do with it. *Ibid.*

4. In other cases it depends upon a variety of circumstances arising from the motive and intent, and then it must be left, as an open question of fact, to the jury, with instructions as to what, in law, constitutes fraud. *Ibid.*

5. And in other cases there is a presumption of fraud, which may be rebutted. Then, if there is any evidence tending to rebut it, that must be submitted to the jury; but, if there is no such evidence, it is the duty of the court so to adjudge, and act upon the presumption. *Ibid.*

6. When A. made a fraudulent deed of trust of certain property to C., and C. for a fair price and *bona fide* conveyed the property to B.: *Held*, that B. acquired a good title, notwithstanding the previous fraudulent transaction. *White v. White*, 265.

GRANTS.

1. A grant founded on an entry made on land subject to entry cannot be collaterally impeached for defects in the entry or irregularity in any preliminary proceeding. *Stanmire v. Powell*, 312.

2. But when the law forbids the entry of the vacant land, in a particular tract or country, a grant for a part of such land is absolutely void; and that may be shown in ejectment. *Ibid.*

3. The General Assembly, in 1849, passed the following resolution: "*Resolved*, That the Secretary of State be and he is hereby authorized and required to issue to Ailsey Medlin, or her heirs or assigns, for the services of her father, etc., or his heirs or assigns, a grant or grants for a quantity of land, not exceeding 640 acres, to be located in one body, or in quarter-sections of not less than 160 acres, on any of the lands of this State now subject to entry by law; said grant or grants to be issued on the application of the said Ailsey Medlin, her heirs or assigns, as she or they may prefer, in one or four grants. 2. That the said warrant or warrants shall or may be laid so as to include any lands now belonging to the State for which the State is not bound for title: *Provided*, that this act does not extend to any of the swamp lands in this State." The grant under this resolution issued for land lying in the Cherokee Country. *Ibid.*

4. *Held*, that the grant was void, having issued for land lying in the Cherokee Country, where the lands are prohibited from entry by the general law, and where, indeed, no entrytaker's office is established. *Ibid.*

GUARDIAN AND WARD.

1. A guardian can only hire out the slave of his ward until the latter comes of age. *Milton v. McKesson*, 475.

2. Upon coming of age, the ward has a right to take the slave out of the possession of the person who has hired him from the guardian for a long period. *Ibid.*

INDICTMENTS.

1. A *nolle prosequi* in criminal proceedings does not amount to an acquittal of the defendant, but he may again be prosecuted for the same offense, or fresh process may be issued to try him on the same indictment, at the discretion of the prosecuting officer. The defendant, however, when a *nolle prosequi* is entered, is not required to enter into recognizance for his appearance at any other time. *S. v. Thornton*, 256.

2. A *capias*, after a *nolle prosequi*, does not issue as a matter of course, at the will of the prosecuting officer, but upon permission of the court first had, and the court will always see that its process is not abused, to the oppression of the citizen. *Ibid.*

3. An indictment for receiving stolen goods must aver from whom the stolen goods were received, so as to show that he received them from the principal felon. If received from any other person, the statute does not apply. *S. v. Ives*, 338.

4. In an indictment, under the statute of 1846-'47, ch. 7, for injury to a dwelling-house of which a lessee, his term yet unexpired, has the actual possession, the indictment, if it can lie at all, must state the property to be in the lessee. *S. v. Mason*, 341.

5. But the act does not embrace the case of destruction or damages to buildings, etc., by the owner himself, and in law the lessee is the owner during the continuance of his term. *Ibid.*

INSOLVENT DEBTORS.

1. Where, under the provisions of the act of 1848, ch. 38, three freeholders are appointed to lay off property of an insolvent debtor, to be exempt from execution, they have authority, under the words "other property," to set apart for the use of the debtor a mare and five hogs, provided these articles do not exceed $50 in value. *Dean v. King*, 20.

2. The act of 1844 includes, under the term "debts contracted," a bond given after 1 July, 1845, though the consideration of the bond had existed before that time. *Ibid.*

3. Under the act of 1848 the insolvent debtor has a right to have allotments for his benefit made by the freeholders, from time to time, as his necessities may require, provided the allotments be made at intervals not unreasonably short. *Ibid.*

4. Each allotment must be complete in itself, so as to designate all the articles allowed. *Ibid.*

JAILERS.

1. When a debtor is committed to prison, and is permitted to take the prison bounds, the jailer is not under any obligation, while he continues in the bounds, to furnish him with provisions for his support, nor, of course, can the creditor, at whose suit he is confined, be compelled to reimburse the jailer for any sum so expended. *Phillips v. Allen*, 10.

2. Where a debtor, who is imprisoned at the instance of his creditor, has no property in this State out of which the prison fees and provisions and his support can be satisfied, notwithstanding he may have sufficient in another state, the jailer has a right to recover the amount from the creditor, under Rev. Stat., ch. 58, sec. 6, making him responsible, *"if the prisoner be unable to discharge them."* RUFFIN, C. J., dissents. *Faucet v. Adams*, 238.

JUDGMENTS.

1. There cannot properly be a final judgment by default, upon an appeal from a justice of the peace: but the matter must be determined upon proofs either by the court or by a jury. *Williams v. Beasley*, 112.

2. Judgments, taken as of course, are from necessity always under the control of the courts whose judgments they purport to be, and of an appellate court, which can treat the matter *de novo*. *Ibid.*

3. Where a *sci. fa.* on a judgment is issued, and the plaintiff is nonsuited, and issues a second *sci fa.*, a variance between the latter and the former is not material, if both be for the same cause of action and between the same parties. *Trice v. Turrentine*, 212.

4. In an action on a penal bond, the judgment should be for the penalty of the bond and the costs. The damages assessed form no part of the judgment, but should be entered at the foot of the record, and endorsed on the execution, for the guidance of the sheriff. *Ibid.*

5. Where a judgment on the plea of *"nul tiel record"* is reversed on appeal, the case must be sent back for judgment of the court below as to the fact of the existence of the record. *Ibid.*

6. Where there is a penal bond for the payment of money, interest may be recovered upon the sum really due, up to the time of payment, even after judgment. But if the condition is for the performance of some collateral act, as to execute a mortgage or deed of trust as additional security for payment of money, interest cannot be recovered, on a *sci. fa.*, upon the damages assessed. *Ibid.*

JUSTICE'S JURISDICTION.

1. The same strictness is not required in the description of a note in a warrant from a justice of the peace as is required in a description in a declaration in court. It is sufficient if the warrant describes the cause of action so as to bring it within the jurisdiction of a single justice, as defined by statute. *Emmit v. McMillan*, 7.

2. When a justice of the peace renders a judgment in a case where he has jurisdiction, everything is presumed to have been done which

JUSTICE'S JURISDICTION—*Continued.*

it was necessary to do in order to make the judgment regular; and his judgment, like a judgment given in a court of record, is in full force until reversed. *Hiatt v. Simpson*, 72.

LEASES.

1. Verbal agreements for leases for any land for more than three years, and those for mining for any term, though less than three years, are void by statute. *Brites v. Pace*, 279.

2. And a contract to transfer such a term, or part of such a term, must, in like manner, be in writing. *Ibid.*

LIMITATIONS, STATUTE OF.

1. In an action of *assumpsit*, brought for a certain sum of money agreed to be paid, it is no bar to the plea of the statute of limitations that the defendant, within three years, promised to pay the debt in good notes or judgments, which promise was accepted by the plaintiff. *Taylor v. Stedman*, 97.

2. An executor's right to the personal property of his testator commences at the death of the testator, and from that time the statute of limitations begins to run against him. *Arnold v. Arnold*, 174.

3. When a party claims a title in himself under a conveyance from one *non compos mentis*, and has possession under such alleged title, he does not hold as bailee, but although the original owner is not barred by such adverse possession on account of his incapacity, yet when his incapacity is removed, or he dies, leaving an executor, the statute will begin to run. *Ibid.*

4. To repel the statute of limitations, a promise must be either for a sum certain or for that which may be and afterwards is reduced to a certainty. *Moore v. Hyman*, 272.

5. A. brought a suit against B. for the amount of 150 barrels of herrings placed with B. for sale. The statute of limitations was pleaded. B. claimed a discharge for 6 barrels, and as to this the parties disagreed. B. asked A. why he sued. The reply was for a settlement. B. said, "We are willing to settle, and always have been willing," and the matter was then, by agreement, referred to arbitrators, who never decided: *Held*, that the promise, implied in the language used, was uncertain as to the sum, and that sum never having been ascertained in the mode agreed on, the promise, being for an uncertain sum, was too vague to have any legal effect. *Ibid.*

6. A constable received claims to collect from solvent persons in February, 1842. The sureties on his bond were sued in October, 1845, for his failure to collect: *Held*, that the statute of limitations did not bar the suit. *Chunn v. Patton*, 421.

7. The donee of a slave by parol is the bailee of the donor, and no length of possession, although upon a claim of property, will constitute a title in him unless there has been a demand and refusal, or some act done in opposition to the will of the donor changing the nature of the possession. *Baxter v. Henson*, 459.

MALICIOUS MISCHIEF.

1. A man has a property in a dog, so that an indictment for malicious mischief in killing one will lie. *S. v. Latham*, 33.

2. To support an indictment for malicious mischief in killing a dog, it must be shown that the killing was from malice against the master. It is not sufficient that it was the result of passion excited against the animal by an injury he had done to the defendant's property. *Ibid.*

MALICIOUS PROSECUTION.

In an action for malicious prosecution, where it appeared there were circumstances of a suspicious character against the defendant in the prosecution which would amount to probable cause, if unexplained, yet if these were denied and satisfactorily explained to the prosecutor before he commenced his prosecution, he cannot avail himself of the defense of probable cause. *Honeycut v. Freeman*, 320.

MARRIAGE.

1. The words, "the cure of souls," used in the marriage act, Rev. Stat., ch. 71, does not imply a necessity that the minister should be the incumbent of a church living, or the pastor of any congregation or congregations in particular; but they do imply that the person is to be something more than a minister merely, and that he has the faculty, according to the constitution of his church, to celebrate matrimony, and, to some extent, at least, has the power to administer the Christian sacraments, as acknowledged and held by the church. *S. v. Bray*, 289.

2. When a marriage is claimed to have been made by a minister, the extent of his authority for that purpose should appear. *Ibid.*

3. The statute admits every one to be a minister who, in the view of his own church, has the cure of souls by the ministry of the Word, and of any of the sacraments of God, according to its ecclesiastical policy, implying spiritual authority to receive or deny and desirous to be partakers thereof, and to administer admonition or discipline, as he may deem the same to be to the soul's health of the person and the promotion of godliness among the people. When to such a ministry is annexed, according to the canons or statutes of the particular church, the faculty of performing the office or solemnizing matrimony, the qualification of the minister is sufficient, according to our statute. *Ibid.*

MILLS.

1. In condemning an acre of land for the purpose of erecting a mill, the court is forbidden to confirm the report of the commissioners if it take away "houses, etc.,"—and, by necessary implication, the commissioners are forbidden to include them in their survey. *Burgess v. Clark*, 109.

2. The commissioners, therefore, are not authorized to include in their valuation any houses found on the condemned acre, even though erected there by the petitioner, before the proceedings were commenced. The valuation must be confined to the naked land. *Ibid.*

MORTGAGES.

1. Whether an instrument is a mortgage or not is a question of law for the decision of the court, and it would be error to submit it to the jury. *Smith v. Jones*, 442.

2. The probate of a deed of trust or mortgage, under the provisions of the act of Assembly, Rev. Stat., ch. 37, sec. 25, is not valid when taken by one who, though acting as deputy clerk, has not been duly appointed, nor qualified by taking the oaths to support the constitutions of the United States and of this State and an oath of office, as prescribed by the act, Rev. Stat., ch. 19, sec. 15. A registration, therefore, under such a probate, has no effect in rendering such a deed operative, according to the provisions of the first recited act. *Sudderth v. Smyth*, 453.

OVERSEERS.

1. The master is answerable for any carelessness, ignorance, or want of skill in his overseer, while engaged in the course of the master's employment, whereby a permanent injury is done to a slave, hired from another person. *Jones v. Glass*, 305.

2. Per RUFFIN, C. J.: This was simply a case of bailor and bailee, and on the principles applicable to that relation the plaintiff should recover. *Ibid.*

PRACTICE.

1. A party claiming a new trial because of evidence improperly rejected, must set forth in his bill of exceptions what was the evidence tendered, in order to enable the court to decide upon its relevancy. *Overman v. Coble*, 1.

2. In an action upon a bond, the court, on affidavit that the bond is believed to be a forgery, may, at the appearance term, under the act, Rev. Stat., ch. 31, sec. 86, order the plaintiff to file the instrument for such time as the court may think proper, in the clerk's office, for the inspection of the defendant and others. *McGibboney v. Mills*, 163.

3. A court cannot, under the act, Rev. Stat., ch. 31, sec. 86, order the production of papers by the defendant, on the application of the plaintiff, where no declaration has been filed, so that, in case the papers are not produced, the court can render judgment for the plaintiff according to the provisions of the act. *Branson v. Fentress*, 165.

4. In indictments for misdemeanors, the court may, without the consent of the defendant, withdraw a juror when in its discretion it judges it *necessary* to the ends of justice. *S. v. Weaver*, 203.

5. What amounts to negligence is a question of law. And the plaintiff is entitled to special instructions upon certain facts presented by the testimony, or "upon the whole case," if he chooses to subject himself to the disadvantage of having all the conflicting parts taken against him. *Avera v. Sexton*, 247.

PRACTICE—*Continued.*

6. It is error to refuse such special instructions when called for, and to submit the matter to the jury with general instructions merely. *Ibid.*

7. An appeal was taken to the Supreme Court, and a final judgment there rendered. A writ of error, *coram nobis*, upon the ground that one of the parties died before the trial in the Supreme Court, cannot be allowed in that court. *Latham v. Hodges*, 297.

8. Error for matter of fact lies only in the court in which the record and judgment are, and not to reverse the judgment of another court, and especially of a higher one. *Ibid.*

9. It is the duty of a judge, when he does charge upon evidence, to collate it, and bring it together in one view, on each side, with such remarks and illustrations as may properly direct the attention of the jury. It is also his duty to bring to the notice of the jury principles of law or facts which have an important bearing upon the case, though omitted in the argument of counsel. *Bailey v. Pool*, 404.

10. Where there is error in the charge of a judge, and it is excepted to, there must be a *venire de novo*, unless the appellee can show conclusively from the record that the error could not in anywise have affected the verdict. *Chunn v. Patton*, 421.

11. Where there is no proof to establish a fact, the jury should be so instructed; and it is not the duty of the court to state to them an abstract proposition, but to state the law as applicable to the facts proved. *Brown v. Patton*, 446.

12. If the court be dissatisfied with the verdict of a jury, they can only grant a new trial. They cannot, unless by the agreement of the parties, go farther, and direct the plaintiff to be nonsuited. *Dickey v. Johnson*, 450.

13. Where in an action of warranty the only question raised is as to the proper rule respecting damages, and the jury find all the issues in favor of the defendant, the charge of the judge becomes immaterial, and, even if erroneous, cannot be reviewed. *Ramsay v. Morris*, 458.

14. The true meaning and import of the act, Rev. Stat., ch. 31, secs. 40, 42, are that if the jury shall find a less sum than $60 to be due to the plaintiff, he shall not be nonsuited, if he shall show by affidavit that the sum for which the suit is brought is really due, "but that for want of proof or that the time limited for the recovery of any article bars a recovery," or that for some other cause of the like kind the verdict was for so small a sum as to show that the suit was commenced in the Superior Court in good faith, and not for the purpose of evading the operation of the act, the verdict being held to be only *prima facie* evidence of an intent to make such evasion. As, in this case, where the plaintiff fairly thought he was entitled to interest, but the jury would not allow it. *Johnston v. Francis*, 465.

15. The decision of the judge below as to the question what the instrument contains, to be decided by inspection, cannot be reviewed in this Court. *S. v. Mann*, 491.

PRACTICE—*Continued.*

16. Whether a witness, who has been examined, shall be reëxamined, is a question of discretion for the judge below, and from his decision no appeal lies. *Ibid.*

17. It is error in a judge to tell a jury, in his charge, that from the testimony of A. B., the prosecutor, and from the nature of his testimony otherwise, it was *not possible* for the witness innocently to be in error; it was, therefore, a question of guilt on the one hand, or corrupt false swearing on the other. *S. v. Presley*, 494.

PRESUMPTION.

1. No mere possession of land for a period of time less than thirty years will authorize the presumption of a grant. *Mason v. McLean*, 262.

2. When a person has been sued on his bond as administrator, within two years after the relator's coming of age, he having been an infant at the time of the execution of the bond, the administrator, though the bond was given more than ten years before action brought, can have no advantage from the act of Assembly relating to presumption of payment. *Threadgill v. West*, 310.

3. Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead; there is none as to the time of his death. Where a precise time is relied upon, it must be supported by sufficient evidence before the jury, besides the lapse of seven years since last heard of. *Spencer v. Roper*, 333.

4. To rebut the presumption of the payment of a bond, the defendant proved that the defendant said to the holder, "If you will prove that it is my handwrite, and is a just note, I will pay it"; *Held*, that the plaintiff was bound to show not only the execution of the note, but also its justness, as, for instance, what it was given for, the circumstances under which it was given, etc., so as to show that it was not obtained by fraud or surprise, etc., and was in fact "a just note." *Walker v. Walker*, 335.

SHERIFF.

Although a sheriff may have trover or trespass for goods seized in execution and taken from him by another, his deputy cannot. The law vests the property in the sheriff, because he becomes liable for the goods, and the debtor is discharged. But the law charges the deputy with no duty to the creditor, and if he makes default in serving an execution, he cannot be sued for it, but his principal only. In such a case the deputy is not a bailee as to the possession, but is merely a servant to his superior, and holds for him, and therefore has no action himself. *Hampton v. Brown*, 18.

SLANDER.

1. In an action of slander, a plaintiff has no right to ask a witness what he considered to be the meaning of the words spoken, except in the cases: *Sasser v. Rouse*, 142.

SLANDER—*Continued.*

2. *First*, Where the words in their ordinary meaning do not import a slanderous charge, *if they are susceptible of such a meaning*, and the plaintiff *avers* a fact from which it may be inferred that they were used for the purpose of making the charge, he may prove such averment, and then the jury must decide whether the defendant used the words in the sense implied or not. *Ibid.*

3. *Secondly*, The exception is, where a charge is made by using a cant phrase, or words having a local meaning, or a nickname, when advantage is taken of a fact, known to the persons spoken to, to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such facts, then the plaintiff must make an averment to that effect, and may prove, not only the truth of the averment, but, also, that *the words were so understood by the person to whom they were addressed;* for, otherwise, they are without point, and harmless. *Ibid.*

SLAVES.

1. Under Rev. Stat., ch. 111, sec. 31, a master is not indictable for permitting his slave to go at large, hiring his own time; he is only subject to the penalty of $40 imposed by that section of the act. Nor is the slave indictable. *S. v. Nat*, 154.

2. But the owner is indictable, under section 32 of the same act, for permitting his slave to go at large *as a free man*, exercising his own discretion in the employment of his time. *Ibid.*

3. Under the provisions of Rev. Stat., ch. 11, sec. 41, the justice of the peace before whom a slave is brought, charged with an offense not capital, must decide whether the offense is of such a nature as to require a greater punishment than he is authorized to inflict, and shall give judgment accordingly. *S. v. Bill*, 373.

4. In such a case an appeal is allowed by the act of 1842, ch. 9, sec. 1, to the county court, which may decide without a trial by jury. No appeal from that court to the Superior Court is authorized by law. *Ibid.*

TAXES.

Where contiguous tracts of land are conveyed and held by one deed as one tract, they are to be taken as one tract, though they lie in different counties and are separated by a river; and, therefore, the owner is bound to list such lands as one tract in the county in which he resides. *Hairston v. Stinson*, 479.

TRESPASS.

1. When an act of violence, of itself is complained of, trespass *vi et armis* is the proper action; when the consequences only are complained of, then case is the proper action. *Kelly v. Lett*, 50.

2. In some cases the party may waive the trespass and bring case for consequential damages, alleging that the act was *negligently* done. But where the act is alleged to be willfully done, trespass is the only

TRESPASS—*Continued.*

action. The right of election cannot exist except in cases where there is a separate and distinct form of action besides the trespass. *Ibid.*

3. Where it is alleged that the plaintiff was the owner of a mill, a short distance from one occupied by the defendant, on the same stream, and that the defendant, *willfully and with intent to injure the plaintiff*, frequently shut down his gates so as to accumulate a large head of water, and then raised them, by which means an immense volume of water ran with great force against the plaintiff's dam, and swept it away: *Held*, that trespass, and not case, was the proper remedy. *Ibid.*

4. In an action for trespass for cutting down timber trees, the rule of damages is the value of the timber when it is first cut down, and becomes chattel. *Bennett v. Thompson*, 146.

5. This rule, however, *it seems*, is not applicable to cases of cutting down ornamental trees, or where the trespass is attended with circumstances of aggravation. *Ibid.*

TROVER.

1. A., having possession of a note, payable to one B., and not endorsed, and claiming the property therein, placed it for collection in the hands of C., who converted the proceeds to his own use: *Held*, that A. could not support an action of trover against C. either for the note or the proceeds, because he had not the legal title to either. *Herring v. Tilghman*, 392.

2. To maintain trover, the plaintiff must show title, or a right of possession, the owner being unknown. *Ibid.*

3. One who is an equitable owner of a bond, but to whom it has not been legally endorsed, has not such an interest in it as will enable him to support an action of trover in his own name. *Killian v. Carroll*, 431.

USURY.

1. In cases of a usury, the question of a corrupt intent must be submitted to a jury. *Kerr v. Davidson*, 454.

2. It is error in the court to assume such intent from the fact that a bond for money borrowed sets forth a larger sum than the amount actually borrowed. *Ibid.*

VENDOR AND VENDEE.

1. If the vendor of a slave makes to the vendee, at the time of the sale, an affirmation as to the soundness of the slave which is false within his knowledge, he is responsible to the vendee in damages. *Ferebee v. Gordon*, 350.

2. A *bona fide* purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person. *Plummer v. Worley*, 423.

WARRANTY.

1. A covenant of warranty, annexed to an estate in land, determines with the estate to which it is annexed. But when one takes a conveyance in fee, with covenant of warranty, from a husband and his wife, and the title of the wife does not pass, in consequence of the want of her privy examination, yet the bargainee takes an estate in fee as to all the world except the wife and those claiming under her, not barred by the statute of limitations. *Lewis v. Cook*, 193.

2. An estate is *determined* only when it *expires by its own limitation*: and when the limitation is in fee, the covenants of warranty run with it, and may be sued on by the bargainee and his assignees, whenever they are evicted by a title paramount. *Ibid.*

3. When a man purchases, at a sheriff's sale under execution, the estate which another professes to have in fee, to certain lands to which covenants in warranty are annexed, he acquires, as incident to the estate, the right to those covenants. *Ibid.*

4. Where covenants of warranty, which run with the land, are contained in a conveyance purporting to be in fee, the tenant in fee in possession cannot by any assignment sever the covenants so as to make them independent of the estate. They are incidents, and cannot be disannexed from their principal. *Ibid.*

5. Where A., who had a fee simple, defeasible in the event of his dying without issue living at his death, conveyed the land in fee with general warranty to B., and afterwards died without issue: *Held*, that the collateral warranty barred his heirs and those claiming under him. *Spruill v. Leary*, 225.

See Judge PEARSON'S dissenting opinion, 408.

6. A warranty of the soundness of a slave includes in it a stipulation that there is no defect in an eye, so as to make it unfit for ordinary purposes; and, therefore, if the slave is near-sighted, there is a breach of the warranty. *Bell v. Jeffreys*, 356.

RUFFIN, C. J., dissents.

WILLS.

It is sufficient that an attesting witness to a will makes his mark. *Pridgen v. Pridgen*, 259.

WRECK SALES.

1. A person who purchases goods at a wreck sale has a right to take off his goods by the most convenient route, though, in doing so, he has to pass over the land of another, who has forbidden him to enter on or cross his land for that purpose. *Hetfield v. Baum*, 394.

2. In such a case, though the land has been granted by the State, a right of way is reserved, from necessity. *Ibid.*

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